IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1497

STATE OF ARKANSAS ..... *Petitioner*

VS.

LONNIE JAMES SANDERS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

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No. _____

STATE OF ARKANSAS ..... *Petitioner*

vs.

LONNIE JAMES SANDERS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, the State of Arkansas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding January 23, 1978.

I. OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 262 Ark. 595, 559 S.W. 2d 704 (1977) and is attached as Appendix A. The record of the hearing on respondent's motion to suppress held January 31, 1977 and his trial held February 3, 1977 is attached as Appendix B.

II. JURISDICTION

The opinion of the Arkansas Supreme Court was filed December 19, 1977. Petitioners's petition for rehearing was

denied by that court and the judgment was entered on January 23, 1978. This Petition for a Writ of Certiorari was filed within ninety days of that date. Jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

III. QUESTION PRESENTED

Whether a warrantless search of both an automobile trunk and an immediate warrantless search of an unlocked suitcase found therein where the search of both is based on probable cause and exigent circumstances is reasonable and lawful under the Fourth Amendment to the Constitution of the United States.

IV. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V. STATEMENT OF THE CASE

On April 23, 1976, Officer David Isom of the Little Rock Police Department Narcotics Squad, acting upon information provided by a confidential informant (T. 25-29), went to the Little Rock Municipal Airport to set up surveillance for the respondent, Lonnie James Sanders. (T. 25, 72). According to

the informant, respondent was scheduled to arrive that afternoon in Little Rock on an American Airlines flight from Dallas, Texas at 4:35 p.m. with a green suitcase carrying marijuana. (T. 31) The informant told Isom that respondent had sent an empty green suitcase to Dallas for the purpose of transporting marijuana back to Little Rock. (T. 31). Accompanied by two other plainclothes officers, Isom observed Sanders get off the 4:35 p.m. Dallas flight and proceed to the baggage claim area of the terminal where Sanders met David Rambo. (T. 26, 74) From a distance, the officers observed respondent wait at the baggage area and pick up a green suitcase. He handed it to Rambo, and he walked to the nearby cab stand and got in a taxicab. (T. 26, 74) Rambo remained in the baggage area for a few moments until the surrounding crowd dispersed, and then he got in the taxicab with respondent. (T. 27, 76, 86) Rambo placed the green suitcase in the trunk of the taxicab (T. 93) and the cab left the airport.

Officer Isom and one of the others followed the taxicab as it proceeded down East Roosevelt Road, a major arterial in Little Rock. (T. 27, 76) The officers had requested assistance from a marked police unit over their radio. The other police car stopped respondent's taxicab on East Roosevelt several blocks from the airport. (T. 47, 76). The cab driver was asked out of the cab and to open his trunk, and he did. Respondent and Rambo were taken out of the cab by the police and placed against the side of the vehicle. (T. 48) They were not placed under arrest at that point. (T. 48) In the trunk, the officers found the green suitcase, and, without seeking anyone's consent, they opened it (T. 35). It was unlocked. (T. 35) In the suitcase they found what they suspected was (T. 43), and later proved to be, 9.3 pounds of marijuana. (T. 147) Respondent Sanders and

Rambo were arrested and transported to the police department. (T. 43) The cab driver was released.

On October 14, 1976, Sanders was charged by felony information with possession of marijuana with intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976), the Uniform Controlled Substances Act. Sanders' motion to suppress the evidence found in the suitcase was denied after a hearing held January 31, 1977. (T. 7) Sanders was tried by a jury and found guilty on February 3, 1977 and sentenced to ten years in the state penitentiary and fined $15,000. (T. 8, 9).

On appeal to the Arkansas Supreme Court, the conviction was reversed because the search was held unreasonable under the Fourth Amendment to the United States Constitution.[1] *Sanders* v. *State*, 262 Ark. 595, 559 S.W. 2d 704 (1977), Appendix A.

The court first held there was probable cause for the police to believe there was a controlled substance in the green suitcase when it was seized and searched under the Fourth Amendment. The confidential informant gave detailed information about the respondent's arrival at the Little Rock Airport on April 23, 1976 (and the police corroborated all the details from the informant by personal observation at the airport).

The court next held the search was not justified under the automobile exception because the police took possession of the suitcase even though the cab was on the street.

[1]The decision was based solely on the Fourth Amendment to the United States Constitution. There were no state grounds involved. *Sanders* v. *State*, 262 Ark. 595, 599, 559 S.W. 2d 704, 706 (1977).

> "[T]here is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant, or support the State's contention that 'mobility of the object to be searched (the green suitcase)' justified a warrantless search. See: * * * *Coolidge* v. *New Hampshire* [403 U.S. 443]." *Id.*, at 600, 559 S.W. 2d at 706.

The court added that there was a substantially greater expectation of privacy in a suitcase than an automobile under the Fourth Amendment, and the suitcase was sufficiently out of reach not to be within the search incident to an arrest doctrine. *Ibid.*

The court finally stated that once the police had the suitcase in their control, there was no longer any danger of loss or destruction of evidence, and a warrant should have been obtained.

> "The initial seizure of appellant's suitcase, the validity of which appellant does not contest, was sufficient to guard against any risk that evidence might be lost. With the suitcase safely immobilized it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Id.*, at 601, 559 S.W. 2d at 707.

The court was apparently holding that on seizure of the suitcase by the police on the street, exigent circumstances ceased to exist even if there were exigent circumstances for seizure of the vehicle. (Compare *id.*, at 599, 559 S.W. 2d at 706.) Therefore, a warrant was required under the Fourth Amendment to the Constitution of the United States.

VI. REASONS FOR GRANTING THE WRIT

A. THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

1.

The decision of the Supreme Court of Arkansas in this case, 262 Ark. 595, 559 S.W. 2d 704 (1977), on the question of the scope of a warrantless search of an automobile with probable cause and exigent circumstances is in conflict with the decisions of this court in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), *Carroll* v. *United States*, 267 U.S. 132 (1925), and *Cardwell* v. *Lewis*, 417 U.S. 583 (1974). The Arkansas Supreme Court incorrectly applied *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), to the facts of this case and held the immediate search of the unlocked suitcase in the trunk of the taxicab on a city street required a warrant notwithstanding probable cause and exigent circumstances for the initial seizure. The Arkansas court held, in effect, there were no exigent circumstances to substantiate the search of the suitcase after the seizure by the police reduced the suitcase to their exclusive control because the seizure of the suitcase dissipated exigent circumstances. Therefore, the court held the search of the suitcase without a warrant was unreasonable according to Fourth Amendment standards.

The automobile exception to the warrant requirement of the Fourth Amendment was originally outlined in *Carroll* v. *United States*, *supra*, 267 U.S. 132. The two necessary conditions for such a search are probable cause to believe the vehicle is transporting contraband or illegal merchandise and exigent circumstances because of the mobility of the vehicle. *Id.*, at 154,

156. *Carroll* also clearly distinguished the search under the automobile exception from a search incident to an arrest. *Id.*, at 158-159; see also *Chambers*, *supra*, at 47.

Much later, the court more clearly defined the automobile exception as to the exigency requirement in *Chambers* v. *Maroney*, *supra*, 399 U.S. 42. The court there held that when there was probable cause to believe the vehicle was involved in crime and evidence of the crime was in the vehicle and the vehicle was seen on the city streets by the police, there were exigent circumstances for a search and seizure. *Id.*, at 51-52. A search on the street could have been impractical and possibly unsafe. *Id.*, at 52.

In *Chambers*, the court also held that under the automobile exception, given a lawful seizure, a search is permissible.

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend upon a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Id.*, at 51-52.

And see *Texas* v. *White*, 423 U.S. 67 (1975). Under *Chambers* and

the automobile exception, there is no constitutional qualitative difference between a search and a seizure — given a valid seizure under the automobile exception, a valid search is permissible. See Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label*, 4 Mercer L. Rev. 987, 1002-1003 (1976).

Here, the officers had probable cause to believe respondent was carrying marijuana in the green suitcase. Respondent and his accomplice walked to a taxicab and left the airport. The officers called for assistance in stopping the cab, and it was stopped on a busy street off the airport grounds during rush hour. The cab driver was asked to open the trunk, and respondent and his accomplice were gotten out of the cab and stood next to it. They were not yet under arrest. In the trunk, the officers saw the green suitcase. They reached inside the trunk and immediately opened the suitcase. It was unlocked, and they found 9.3 pounds of marijuana in it. There were clearly exigent circumstances for the search and seizure under *Chambers* v. *Maroney* and *Carroll* v. *United States*.

Furthermore, the officers knew that respondent was met at the airport by an accomplice, and they could reasonably suspect others could have been waiting in another car to follow respondent to his destination. The officers called for the assistance of a marked patrol car. The detention on the street was brief but adequate to determine that respondent and his accomplice should be arrested. Under *Chambers*, the vehicle could have been transported to the stationhouse. However, the police also did not want to detain the cab driver unless necessary. In this situation, the lesser intrusion on personal privacy of all concerned was the immediate search on the street during the detention with probable cause rather than requiring the police to arrest,

transport, book and fingerprint respondent, his accomplice, and, possibly, the cab driver and then seek a search warrant for the suitcase.[2] The officers had the lawful authority to seize and search the car. It is illogical to also allow them to seize the suitcase under *Carroll* and *Chambers* but deny them the opportunity to search it at the time of the search of the taxicab when probable cause and exigent circumstances still exist. It is submitted the Arkansas court erred in suppressing the evidence under the Fourth Amendment under *Carroll* v. *United States* and *Chambers* v. *Maroney*. See also *Texas* v. *White*, 423 U.S. 67 (1975).

The decision of the Arkansas court that there were no exigent circumstances also conflicts with *Cardwell* v. *Lewis*, 417 U.S. 583, 595-596 (1974):

> "Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of the arrest. Cf. *Chambers*, *id.*, at 50-51. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's

[2]It is important in this case that the search of the suitcase while the taxicab was stopped on the street was short and immediate. The officers had probable cause to believe marijuana was in the suitcase in the trunk. The intrusion was brief, direct, and no more than was necessary to determine respondent should be arrested. This intrusion is different that that involved in a search at night (*Chambers*, *supra*) or a complete search of an automobile looking for fingerprints, tireprints, or microscopic sweepings or scrapings (see *Cardwell*, *supra*) or conducting an inventory (*South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433 (1973)).

necessitating prompt police action." [Footnote omitted]

The Arkansas court held that while there were exigent circumstances for the seizure, there was adequate time to secure a warrant for the suitcase, and the exigent circumstances for the search of the suitcase were dissipated by the police taking control of the suitcase (relying on *Chadwick*). Here, probable cause and exigent circumstances arose together as Sanders picked up the suitcase at the Little Rock airport and got into a cab. Exigent circumstances do not evaporate just because of the fact the officers opened the suitcase in the trunk of the cab when they just determined they had probable cause to believe contraband was in it. This holding conflicts with *Cardwell* v. *Lewis* and *Chambers* v. *Maroney*. See *Texas* v. *White*, *supra*, 423 U.S. 67.

2.

The decision below improperly applied the warrant requirement of *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), to the search of the suitcase contemporaneous with the search of the trunk.

United States v. *Chadwick* involved a search incident to an arrest. The footlocker in *Chadwick* was seized and removed to a building for a search. The court held that, having been immobilized at another location, the footlocker was subject to the warrant requirement of the Fourth Amendment. *Id.*, at 13. The court rejected the contention the footlocker, by the fact of its mobility, was subject to the automobile exception to the Fourth Amendment when it was in the exclusive control of the police. *Ibid.*

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971), involved a

vehicle parked at a home for which the police had probable cause to search for weeks and was impounded. Thus, the court held there was no exigency for a search without a warrant under the automobile exception when the police knew the car was going nowhere. This case differs because there clearly were exigent circumstances from the time Sanders grabbed the suitcase and headed for the cab. Exigent circumstances obtained here under *Chambers* and *Carroll*, and exigent circumstances do not legally dissipate under *Chambers*, *Texas* v. *White*, *supra*, and *Cardwell* v. *Lewis*, *supra*. *Coolidge* is distinguishable because the search there never involved exigent circumstances.

The Arkansas court held below that there were no exigent circumstances because (1) the suitcase *itself*, because of its mobility, was not within the automobile exception of the warrant requirement of the Fourth Amendment under *Chadwick*, and (2), under *Chadwick*, a warrant was required during this automobile search for the suitcase when the suitcase was in the possession of the police even though possession was at the scene of the seizure.[3]

The Arkansas court erred in holding this case was a search incident to an arrest under *United States* v. *Chadwick* rather than an automobile search under *Chambers* v. *Maroney* and *Carroll* v. *United States*. The court's holding blends the automobile exception and the search incident doctrine together, and the result emasculates the automobile exception to the Fourth Amendment in Arkansas. Even an automobile can sometimes be reduc-

[3]The parties, however, never even argued the second proposition. Respondent, conceding probable cause, argued that the exigent circumstances requirement of the automobile exception was not present because of the officers' prior knowledge of his arrival at the airport. The State argued this case involved an automobile search under *Chambers* and *Carroll* for which there were exigent circumstances. Neither party considered *Chadwick* applicable, and it was not argued.

ed to complete control of the police by impoundment and storage. The next step in Arkansas is to eliminate the automobile exception to the Fourth Amendment entirely. The decision of the Arkansas court is erroneous in its application of *Chadwick* and *Coolidge* and in the ignoring of the automobile exception to the Fourth Amendment as to the search of the suitcase contemporaneous with the search of the trunk on a city street. This case simply does not involve a search incident to an arrest or a lack of exigency.

Since the decision in *United States* v. *Chadwick*, the Fifth, Eighth, and Ninth Circuit United States Courts of Appeal have held that *Chadwick* does not apply to the automobile exception to the Fourth Amendment. See *United States* v. *Montgomery*, 558 F. 2d 311 (5th Cir. 1977) (on rehearing after *Chadwick*; facts and prior opinion at 554 F. 2d 754); *United States* v. *Stevie*, Nos. 77-1335, 77-1424 (8th Cir., November 17, 1977), *motion for rehearing en banc granted*;[4] *United States* v. *Finnegan*, 568 F. 2d 637 (9th Cir. 1977). Each of these decisions upheld a warrantless search of luggage contemporaneous with a warrantless search of an automobile under the automobile exception to the Fourth Amendment. They held that luggage can be searched because it is in the car; not necessarily because luggage is itself mobile. *United States* v. *Stevie* is almost factually identical to this case.

3.

The decision of the Arkansas court below conflicts with other actions of this court in denying certiorari in several cases upholding searches of briefcases, suitcases, and other containers found during a warrantless search of an automobile under the

[4]Motion for rehearing *en banc* granted January 6, 1978. Oral argument scheduled for April 6, 1978.

automobile exception to the Fourth Amendment: *Swonger* v. *United States*, unreported below, No. 76-2555 (6th Cir. 1977), summary at 46 U.S.L.W. 3225, *cert. denied*, 46 U.S.L.W. 3470 (No. 77-314; January 24, 1978); *United States* v. *Soriano*, 497 F. 2d 147 (5th Cir. 1974) (en banc), *reaffirmed without opinion sub nom.*; *United States* v. *Aviles*, 535 F. 2d 658 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3840 (Nos. 76-5132, 76-5143; June 27, 1977); *United States* v. *Tramunti*, 513 F. 2d 1087 (2d Cir. 1975), *cert. denied*, 423 U.S. 832; *United States* v. *Canada*, 527 F. 2d 1374 (9th Cir. 1975), *cert. denied*, 429 U.S. 867; *United States* v. *Issod*, 508 F. 2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916; *State* v. *Birdwell*, 6 Wash. App. 284 (1972), *cert. denied*, 409 U.S. 973.

B. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL AND THE HIGHEST COURTS OF OTHER STATES.

1. Numerous other appellate courts have considered the question raised in this case, and they have uniformly held that a warrantless search of luggage or other containers during a warrantless search of an automobile conducted under the automobile exception to the warrant requirement of the Fourth Amendment is lawful:

COURTS OF APPEAL: See, *e.g.*: *United States* v. *Tramunti*, 513 F. 2d 1087, 1104-1105 (2d Cir. 1975), *cert. denied*, 423 U.S. 832; *United States* v. *Soriano*, 497 F. 2d 147 (5th Cir. 1974) (en banc), *reaffirmed without opinion sub nom.*, *United States* v. *Aviles*, 535 F. 2d 658 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3840 (Nos. 76-5132, 76-5143; June 27, 1977); *United States* v. *Montgomery*, 558 F. 2d 311, 312 (5th Cir. 1977) (on rehearing after *Chadwick*; facts and prior opinion at 554 F. 2d 754); *United States* v.

McGarrity, 559 F. 2d 1386, 1387-1388 (5th Cir. 1977); *United States* v. *Chuke*, 554 F. 2d 260, 262-264 (6th Cir. 1977); *United States* v. *Giles*, 536 F. 2d 136, 140 (6th Cir. 1976); *United States* v. *Issod*, 508 F. 2d 990, 993 (7th Cir. 1974), *cert. denied*, 421 U.S. 916; *United States* v. *Stevie*, (No. 77-1335, 77-1424; November 17, 1977), *motion for rehearing en banc granted*[5]; *United States* v. *Canada*, 527 F. 2d 1374, 1380 (9th Cir. 1975); *cert. denied*, 429 U.S. 867; *United States* v. *Finnegan*, 568 F. 2d 637, 640-641 (9th Cir. 1977).

STATE COURTS: *People* v. *Kreichman*, 37 N.Y. 2d 693, 376 N.Y.S. 2d 497, 339 N.E. 2d 182 (1975); *People* v. *Lemmons*, 40 N.Y. 2d 505, 387 N.Y.S. 2d 97, 354 N.E. 2d 836 (1976); *State* v. *Birdwell*, 6 Wash. App. 284, 492 P. 2d 249, 253 (1972), *cert. denied*, 409 U.S. 973; *Wimberly* v. *Superior Court*, 45 Cal. App. 3d 486, 119 Cal. Rptr. 514, 519-521 (1975), *vacated on other grounds*, 16 Cal. 3d 557, 128 Cal. Rptr. 641, 547 P. 2d 417 (1976); *People* v. *Brajevich*, 174 Cal. App. 2d 438, 344 P. 2d 815 (1959); *State* v. *Lee*, 313 So. 2d 441 (Fla. App. 1975); *People* v. *Orlando*, 305 Mich. 686, 9 N.W. 2d 893 (1943); *People* v. *Kremko*, 52 Mich. App. 565, 218 N.W. 2d 112, 115 (1974); *State in Interest of Wagster*, 348 So. 2d 751 (La. 1977); *Peal* v. *State*, 232 Md. 329, 193 A. 2d 52 (1963); *State* v. *Blood*, 109 Kan. 812, 378 P. 2d 548 (1963); *Commonwealth* v. *Scull*, 200 Pa. 122, 186 A. 2d 854 (1962), *cert. denied*, 376 U.S. 928.

2. The only decision appearing to support the decision of the Arkansas court is *Ward* v. *State*, 224 S.E. 2d 96, 98 (Ga. App. 1976), stating in dictum that it was correct that the police did not look in a money bag during the search of the trunk of an automobile.

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[5]See note 4, *supra*.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Lonnie James SANDERS *v.* STATE of Arkansas

CR 77-171

Opinion delivered December 19, 1977
(Division I)

Appeal from Pulaski Circuit Court, Fourth Division, *Richard B. Adkisson*, Judge; reversed and remanded.

McArthur & Johnson, for appellant.

Bill Clinton, Atty. Gen., by: *Robert J. Govar*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Justice. The fundamental inquiry to be made by the Court in this case is whether or not the warrantless search of appellant's suitcase by Little Rock Police officers is reasonable under the circumstances involved.

FACTS

Appellant, Lonnie James Sanders, was charged by information by the Prosecuting Attorney of the Sixth Judicial District with possession of a controlled substance (marijuana) with intent to deliver in violation of Act 590 of 1971, as amended.

The charge was the culmination of an intensive surveillance of appellant by the Little Rock Police Department, hereafter referred to as the police, just prior to and during his scheduled arrival at the Little Rock Municipal Airport on April 23, 1976.

The police had been advised by a confidential informant some time prior to April 23, 1976, that appellant had sent an

empty green suitcase to Dallas, Texas, on a flight and that in a day or two, appellant would go to Dallas to pick up the suitcase and that the suitcase would be containing marijuana.

On the morning of April 23, 1976, the informant advised the police that appellant would be arriving at the Municipal Airport of Little Rock, Arkansas, at 4:35 p.m. on April 23. 1976, and would deplane at Gate 1 and that appellant would have the green suitcase containing the contraband.[1] The police set up a surveillance at the Municipal Airport awaiting the arrival of appellant. As appellant exited Gate 1, appellant was observed carrying two bags and immediately existed the terminal and placed the two bags in the trunk of a waiting taxicab. Appellant returned to the luggage area inside the terminal and took a green suitcase from the luggage rack and passed it to one David Rambo. Appellant immediately left the terminal and got into the compartment of the cab. Rambo waited inside the terminal near the luggage area a few minutes and he subsequently exited the terminal and placed the green suitcase in the trunk of the cab and took a seat in the compartment of the vehicle. As the taxi departed the airport, the police followed in an unmarked vehicle. As the cab proceeded down East Roosevelt Road, a separate unit of the police, upon request of the officers following the taxi, stopped the taxicab and the officers following the cab requested the cab driver to open the trunk of the vehicle. Another officer directed appellant and Rambo to step out of the vehicle and stand to the side of the taxicab; police officers, without the consent of the appellant or Rambo, opened the green suitcase and found 9.3 pounds of marijuana. Appellant and Rambo were then placed under arrest and appellant was placed in one police unit and Rambo in another and were taken to the Little Rock Police Department.

On January 31, 1977, a hearing was conducted on appellant's Motion to Suppress the evidence which was

[1]The informant had supplied information to the police in the past which had proven to be reliable and rewarding in the police's effort to cope with the drub problem.

denied by the trial court.

On February 3, 1977, appellant was found guilty by a jury as charged and was given ten years in the Department of Correction and a fine of $15,000.00.

APPELLANT'S CONTENTIONS

Appellant alleges the following as the grounds for reversal of his conviction:

1. The trial court erred in denying appellant's Motion to Suppress the evidence gained as a result of an illegal search.

2. The trial court erred in allowing the co-defendant to present evidence of a statement allegedly made by appellant and further erred in allowing the co-defendant to present rebuttal evidence directed toward appellant.

3. The trial court erred in admitting into evidence the subject of this charge when it was not properly identified.

THE SEARCH

Appellant's contention that the warrantless search of his green suitcase, under the existing circumstances, was unreasonable and consequently in violation of the Fourth Amendment to the United States Constitution has merit. We conclude that the trial court erred in denying appellant's Motion to Suppress the evidence confiscated from the suitcase and, therefore, appellant's conviction is reversed.

It is well recognized that warrantless searches are per se unreasonable unless they fall within some established exception to the warrant requirement of the Fourth Amendment to the United States Constitution. One of these exceptions is

probable cause coupled with exigent circumstances. But probable cause alone is insufficient for a warrantless search to square the mandate of the Fourth Amendment against unreasonable searches. *United States* v. *Chadwick*, ____ U.S. ____, 97 S. Ct. 2476; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022; *Horton* v. *State*, 262 Ark. 211, 555 S.W. 2d 226; *Perez* v. *State*, 260 Ark. 438, 541 S.W. 2d 915.

The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it. For the confidential informant, who had supplied reliable information in the past, had advised the police of appellant's mode and manner of transporting marijuana into the state; the police were given the type and color of the suitcase that was being used by the appellant; the approximate date that the empty suitcase was sent to Dallas was supplied to the police; the date and time of appellant's arrival at the Little Rock Municipal Airport was within the immediate knowledge of the police; the name of the commercial airline, as well as the flight number that appellant would be traveling on was revealed to the police by the informant; and the police were also told the gate number that appellant would exit when he deplaned.

Moreover, appellant, at the time, was a resident of Little Rock and was no stranger to the police. The search of the green suitcase can not be justified under the "automobile exception" as claimed by the State. It must also be remembered that appellant's mode of transportation from the Little Rock Municipal Airport was by a local taxicab; the green suitcase was locked in the trunk of the taxicab[2]; the police took possession of the suitcase while appellant was in the compartment

[2]The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental, and the suitcase was not a part of the area from which appellant might gain possession of a weapon or destroy the evidence contained in the suitcase. See: *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

of the taxicab and appellant was later taken into immediate custody and placed in a police car; the confiscation of appellant's suitcase took place shortly after 4:35 p.m. in a metropolitan area. Indeed, there is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant, or support the State's contention that "mobility of the object to be searched (the green suitcase)" justified a warrantless search. See: *Perez* v. *State*, supra; *Tygart* v. *State*, 248 Ark. 125, 451 S.W. 2d 225, cert. den. 400 U.S. 807, 91 S. Ct. 50; *Coolidge* v. *New Hampshire*, supra.

To paraphrase the Unied States Supreme Court's observation in *United States* v. *Chadwick*, supra, the factors which diminish the privacy aspects of an automobile do not apply to appellant's suitcase. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Nor does the suitcase's mobility justify dispensing with the added protections of the Warrant Clause. Once the Little Rock police had seized appellant's suitcase from the trunk of the taxicab and had the suitcase under their exclusive control, there was not the slightest danger that the suitcase or its contents could have been removed before a valid search warrant could be obtained. The initial seizure of appellant's suitcase, the validity of which appellant does not contest, was sufficient to guard against any risk that evidence might be lost. With the suitcase safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

CO-DEFENDANT OFFERS AS EVIDENCE STATEMENT ALLEGEDLY MADE BY APPELLANT

Over strenuous objections of appellant, on the grounds of relevancy, the trial court permitted Jonas Rambo to offer the following evidence in support of appellant's co-defendant, David Rambo. "He (appellant) told me if I'd let David (the co-defendant) take the rap for a year, he'd get him out of jail. First told me he had a lawyer for both of them, then went to court and found he didn't have a lawyer for David, but he told me if I'd let David take the rap for both of them he would go ahead. He'd make enough money to get a good lawyer and get him out."

We hold that the trial court did not commit error in admitting this testimony inasmuch as the testimony was quite relevant inasmuch as David Rambo, in testifying in his own behalf, corroborated the testimony of law enforcement officers as to what transpired at the airport after appellant and the co-defendant arrived from Dallas. It was David Rambo's contention that appellant was completely unknown to David Rambo before the two men met at the Dallas, Texas, airport, while on the other hand, appellant claimed that he and David Rambo were cousins, and that he had no knowledge that the suitcase contained marijuana, but he had agreed to carry the bag once the two reached Little Rock in return for $5.00 that appellant had agreed to pay him. It is obvious that David Rambo was seeking to convince the jury that he had participated in the drug running operation unknowingly and that his only function in the scheme was to take the rap for appellant in this case appellant's activities were exposed and criminal charges resulted. Moreover, appellant specifically claimed that he had never seen the suitcase containing the drugs until Rambo placed the suitcase in the taxicab to be used in leaving the airport. In addition, Jonas Rambo supported his son's (David Rambo) testimony and rebutted the testimony of appellant. Jonas Rambo testified that, contrary to appellant's contention, the two defendants were not related. See: Rule 401, Arkansas Uniform Rules of Evidence.

Appellant also claims that the trial court committed error in permitting Jonas Rambo to testify in behalf of his

son, David Rambo, after David Rambo and appellant had completed presenting evidence in support of their respective cases. This contention is without merit inasmuch as it is well settled that a large discretion is vested in the trial judges as to the time of introducing testimony. Consequently, reversals will not be ordered unless it is shown that this discretion has been abused to the prejudice of the objecting party. No prejudice has been demonstrated. See: *Marks* v. *State*, 192 Ark. 881, 95 S.W. 2d 634.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN, HOLT, and HICKMAN, JJ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

STATE OF ARKANSAS ..... *Petitioner*

vs.

LONNIE JAMES SANDERS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

APPENDIX

PETITION FOR WRIT OF CERTIORARI
FILED APRIL 19, 1978

CERTIORARI GRANTED
OCTOBER 10, 1978

Req. No. 78-5269 50 Copies

Index

DOCKET ENTRIES

LIST OF RECORD

EXHIBITS

[T. 22]

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR 76-1661

LONNIE SANDERS,
DAVID RAMBO DEFENDANTS

HEARING ON MOTION TO SUPPRESS

BE IT REMEMBERED, that on this 31st day of January, 1977, the same being a day of the regular September 1976 Term of the Pulaski Circuit Court, Fourth Division, before the Honorable Richard B. Adkisson, Judge of said Court, this cause came on to be heard, the State being represented by the Honorable Richard N. Moore, Deputy Prosecuting Attorney, the Defendant Rambo being represented by the Honorable John W. Achor, Chief Deputy Public Defender, and the Defendant Sanders being represented by the Honorable William C. McArthur, thereupon, the following proceedings were had and done, as follows:

THE COURT: Is the same Rambo that's been convicted in this — Where is the defendant?

MR. ACHOR: No, sir.

MR. McARTHUR: I don't think so, this boy is from Dallas. [T. 23]

MR. ACHOR: Your Honor, the defendant, Rambo, is

represented by the Public Defender. Mr. McArthur represents defendant Sanders. Mr. McArthur has filed a Motion to Suppress. I have not filed one, although I intend to, because I haven't gotten the defendant up here to be present during the hearing.

THE COURT: Well, isn't that him over there?

MR. ACHOR: No, that's Mr. Sanders. What I would like to do is join in Mr. McArthur's Motion to Suppress, be permitted to cross examine the witnesses and add something to it, if my defendant gets here, to keep from having the same hearing twice.

THE COURT: All right.

MR. McARTHUR: I think the same evidence would be adduced in both, either case, your Honor.

THE COURT: Okay. All right. Now, is this the same Rambo that has had prior convictions in this Court?

MR. ACHOR: No, sir. No, sir. This defendant, as I understand, has no prior record. He is from Dallas, Texas. [T. 24]

THE COURT: Okay.

MR. ACHOR: It's had plenty of time to go through. Maybe the Little Rock police don't —

THE COURT: (Interposing) Let's don't —

MR. ACHOR: Oh, I didn't realize we're on the record.

THE COURT: It gets expensive when you start paying for

it, all these gratuitous comments. Would you like to go forward with the evidence? Mr. Moore, you may proceed.

THEREUPON,

DETECTIVE DAVID ISOM, a witness called by and on behalf of the State (being first duly sworn), was examined and testified, as follows:

DIRECT EXAMINATION
BY MR. MOORE

Q. State your name and occupation for the record, please.

A. David Isom, Little Rock Police Department.

(THEREUPON, David Isom was duly sworn by the Court.)

A. All right. Detective Isom, were you so employed on April 23rd, 1976? [T. 25]

A. Yes, sir. I was.

Q. And, on that date, did you have occasion to talk to an informant?

A. Yes, I did.

Q. And was this face to face or by phone conversation?

A. First time it was face to face and the second time it was by phone.

Q. All right, sir. And, did the informant give you certain

information at that time?

A. Yes, sir.

Q. And, acting upon that information, what did you do then?

A. I went to the Little Rock Municipal Airport and set up surveillance there waiting for a Lonnie Sanders to return from Dallas, Texas, I believe.

Q. All right. Had you had occasion to talk to this informant at, on previous occasions?

A. Yes, I had.

Q. And, had he given you information on these previous occasions?

A. Yes, sir. He had.

Q. Have you had occasion to check the reliability of this information whether or not it was true and accurate?

A. Yes, sir. I have.

Q. All right, sir. Did anybody accompany you to the Little Rock Airport that evening? [T. 26]

A. Officer Mize and Officer Tuck.

Q. And, did you have occasion to see Lonnie Sanders at the airport that evening?

A. Yes, sir. I did.

Q. And, do you see Lonnie Sanders in Chambers today?

A. Yes, sir. The black male with the brown coat and the blue pants.

MR. MOORE: Let the record reflect he pointed to the defendant.

Q. All right, sir. When did you first see Mr. Sanders that evening?

A. Let me see. It was approximately sixteen thirty hours the flight arrived, I'm sorry, sixteen thirty-five hours and he came out of gate No. 1. He was about the third or fourth person coming off the plane.

Q. All right, sir. And, did you keep Mr. Sanders under observation after he got off the flight?

A. Yes, sir. I did.

Q. And, what did he do?

A. He, when got off the flight he went down to the luggage area in the terminal and there he met with a black male, which was identified as Mr. Rambo, and there was a large crowd down there and Mr. Sanders went over to the luggage area and picked up a green suitcase and brought it back and gave it to Mr. Rambo. Then, he went and got into a taxicab. [T. 27]

Q. Now, you say who. Which defendant are you referring to?

A. Mr. Sanders went over and picked up a green suitcase and brought it back to Mr. Rambo.

Q. All right. And, who got in the taxicab?

A. Mr. Sanders.

Q. What did Mr. Rambo do at that time?

A. He stood there for a few minutes until the crowd dispersed and then he went and got into the same taxicab.

Q. All right. And, where was the suitcase put?

A. In the trunk.

Q. All right, sir. And, what did you do at that time?

A. We followed the taxicab down East Roosevelt and stopped the cab.

Q. All right, sir. And, did you place the occupants of the cab under arrest at that time, specifically Mr. Rambo and Mr. Sanders?

A. Both subjects. Yes, sir.

Q. All right. Did you also confiscate the suitcase in question at that time?

A. Yes, sir. I did.

Q. Did you have occasion to inspect the suitcase?

A. Yes, sir.

Q. What was found inside the suitcase?

A. Approximately ten pounds of marijuana, what appeared to be green vegetable matter, what appeared to be marijuana. [T. 28]

Q. All right. And, up to this point and time, had you had any information whatsoever relating to Mr. Rambo?

A. Yes, sir. No, sir. No, sir. Not Mr. Rambo, no.

Q. All right. The information you had received from the informant had only dealt with Mr. Sanders?

A. That is correct.

Q. Had the — Up to the point when you went to the airport when you saw Mr. Sanders get off of this particular flight when he picked up this particular suitcase, was this exactly how the informant had told you that he would be arriving and what he would be bringing with him?

A. Yes, sir. That's the information I received, be a green suitcase involved.

Q. All right. And, for the record, was there anything else, were there any other drugs found as a result of this arrest at a later time?

A. Yes, sir. Approximately an ounce of heroin.

Q. All right. And, who found this?

A. Officer Beaumont.

Q. And, where was this found?

A. It was found in his patrol unit after he transported Mr. Rambo to the Little Rock Police.

MR. MOORE: All right, sir. You may ask. [T. 29]

THE COURT: Just a second. You state that this is based on this arrest, the probable cause was furnished by a confidential informant?

A. Yes, sir.

THE COURT: And, I believe you stated that he has furnished you information in the past that has proven reliable?

A. Yes, sir. It has.

THE COURT: Did this information he had furnished in the past ever result in a person being convicted of an offense?

A. Yes, sir. On January of that year Mr. Sanders was arrested for possession of marijuana through the information provided by the same informant and there was an arrest in '75 and another arrest in '76 involving narcotics and all of them were convicted. I think Mr. Sanders was placed on probation on his and the other two, the information they gave us it was reduced to a probationary period, if they provided us information.

THE COURT: But, the information was reliable?

A. Yes, sir.

THE COURT: Proved reliable in each of the three cases? [T. 30]

A. Yes, sir.

THE COURT: What information did the informant advise you? What did he tell you was his knowledge?

A. On which particular — On all the cases involved?

THE COURT: Of this case we have under consideration today.

A. The informant gave me information earlier that Mr. Sanders had sent an empty green suitcase to Texas on a flight.

THE COURT: And, how did he say that he knew this?

A. Just by knowing Mr. Sanders. That was the way he was —

THE COURT: (Interposing) Hearsay?

A. Yes, sir.

THE COURT: All right. Go ahead.

A. That, that was the way he was transporting his marijuana back and forth.

THE COURT: All right.

A. Send an empty suitcase by itself and go down and pick it up and bring it back.

FURTHER DIRECT EXAMINATION

BY MR. MOORE:

Q. Had the informant given you the information as to the

exact [T. 31] time of the flight that Mr. Sanders was allegedly returning on?

A. Yes, sir. He told me he would be o , be arriving at sixteen thirty-five hours and arriving on American Airlines at Gate No. 1.

Q. This was in fact the flight that Mr. Sanders came in on that day?

A. Yes, sir. It was.

Q. And, the general appearance of the suitcase did match the description the informant had given you earlier?

A. Yes, sir. A large, green suitcase.

CROSS EXAMINATION
BY MR. McARTHUR

Q. Well, let's go back a little bit. I believe you answered this just a moment ago, but the source of this informant's information was hearsay. Is that correct?

A. Yes, sir.

Q. All right. You did not attempt to check out whether or not this was reliable prior to the arrest?

A. Well, there was no way I could have checked on the suitcase.

Q. Why is that?

A. Well, it would already be sent.

Q. Well, are you saying there'd be no record of that, if he'd shipped something?

A. I'm sure there would be. [T. 32]

Q. Did you check to see?

A. No, sir. I did not.

Q. All right. What was Mr. Sanders carrying when he got off of the airplane?

A. Let me see. He was carrying a brown, leather suitcase and also a smaller blue suitcase.

Q. Okay. Now, you say that he met Rambo at the baggage area. Had you noticed Mr. Rambo before that time?

A. No, sir, I had no knowledge of Mr. Rambo at all.

Q. You don't recall seeing him before you got to the luggage area?

A. No, sir. I was just watching Mr. Sanders.

Q. Where is Mr. Rambo from?

A. I believe he is from Texas. I —

Q. (Interposing) Did he give you an address when you talked to him?

A. Let me see. No, sir. I don't have his address here.

Q. All right.

A. I don't have his case file.

Q. Well, did the green suitcase have one of these tickets on it that the airline puts on it, a luggage check ticket?

A. I'm sure it did. I didn't seize that or anything. I didn't pay that much attention to it.

Q. Would you still have it, if it had been on there?

A. If it was on the suitcase, if it's still attached to the suitcase, I'm sure — [T. 33]

Q. (Interposing) You still have the suitcase?

A. Yes, sir. The lab does.

Q. Did either of these individuals have airline tickets on their person when you arrested them?

A. If they did, I don't have them. I'm sure they did. He had already got off the plane. I don't have any tickets.

Q. You didn't seize that or check that to see if there was a stub that would be attached to his airline ticket?

A. No, sir. I didn't. I didn't check it.

Q. All right. I believe you testified that you saw defendant Sanders walk over to the area where the baggage comes in, pick up the green suitcase and hand it to Rambo and then left. Is that correct?

A. Yes, sir. He went and got into a cab.

Q. All right. A short time thereafter Rambo took the bag, went out. I assume that he or the cab driver put it in the trunk. Is that right?

A. Yes, sir.

Q. All right. And, they drove off —

A. (Interposing) Yes, sir.

Q. — in the same cab?

A. Yes, sir.

Q. When you stopped them some whatever number of blocks it was away, did you ask either of them permission to look in the bag? [T. 34]

A. No, sir.

Q. You didn't ask either of the two men?

A. No.

Q. All right. You just took them out of the car, put them in police units and seized the bag?

A. Yes, sir.

Q. Did you seize the two bags that Mr. Sanders was carrying?

A. Yes, sir. I checked the bags and they looked to be the same, about the same size clothing as Mr. Rambo would wear, much smaller men's clothing and would not fit Mr. Sanders.

Q. Do you have those?

A. No, sir. They were stored upstairs. I don't know if they were released to anyone or not, they were stored.

Q. Okay. You don't know whether you still have them or not, then?

A. No, sir. I could check.

Q. All right. Did you have either one of them try the articles on?

A. No, sir. I didn't.

Q. When you took them out of the vehicle, did you search their persons?

A. Yes, sir.

Q. Did you find anything on either person?

A. I searched Mr. Sanders and I didn't find anything on him.

Q. You found nothing on him? [T. 35]

A. No, sir.

Q. You found nothing in the two bags that he was carrying, other than clothing?

A. That is correct.

Q. No narcotics?

A. No.

Q. No drugs of any sort?

A. No, no drugs.

Q. Did you have the — The driver of the cab, do you have his name?

A. No, sir. I don't He was an older, black gentleman. I didn't get his name.

Q. All right. Was he taken to the police station or was he turned loose there at the scene?

A. He was turned loose. We just took the bags.

Q. Okay. Was the, this green suitcase, was it done any certain way? Did it have ropes on it or straps of any sort?

A. No, sir, just an ordinary green suitcase.

Q. All right. Was it locked?

A. No, sir.

Q. In other words you could open it without any difficulty?

A. The best I remember, you just opened it up. I don't think there were any locks on it at all. [T. 36]

Q. Did you check to see whether either of the parties had keys on them that would have unlocked—

A. (Interposing) No, sir.

Q. — or locked this bag?

A. No, sir. If I remember correctly, it just snapped right open.

Q. All right. Now, the alleged heroin you found was in a, was in a marked unit that assisted you at the scene?

A. That's correct.

Q. Who was in that unit?

A. Mr. Rambo.

Q. How long after the arrest was this heroin found?

A. He was taken directly to the narcotics office and placed in an office and just as soon, just long enough for the officers to get back out and search his car he found the heroin.

Q. Okay. Were both units searched?

A. Yes, sir. I believe they were. That's the standard procedure down there.

Q. All right. Was anything found in the unit that had transported Mr. Sanders?

A. No, sir.

Q. All right. Do you know who did the search on Rambo, the Rambo subject?

A. No, sir. Detective Tuck, I believe. I'm not for sure.

Q. Tuck. Okay. [T. 37]

A. It was either him or Officer Beaumont. I don't know.

Q. But, apparently nothing was found when they searched him initially?

A. No, sir.

Q. Or at least if there was, nobody said anything about it. All right. Did you check — Probably did — I think you've probably already answered this, too. Did you look at the ticket that Lonnie Sanders had, airline ticket?

A. I'm sure I did. I don't remember what it was.

Q. Do you even know whether or not he'd come from Dallas?

A. No, sir. To be honest with you, I don't.

MR. McARTHUR: That's all I have at this time.

CROSS EXAMINATION
BY MR. ACHOR

Q. Now, your confidential informant didn't give you any information concerning Rambo?

A. No, sir. I knew nothing of David Earl Rambo.

Q. Now, Rambo was transported to the station by Beaumont?

A. Yes, sir.

Q. Is that correct? And, Beaumont brought him to the police station?

A. The narcotics office, yes, sir.

Q. And, after he was in the narcotics office, he went back out and found the heroin? [T. 38]

A. Yes, sir.

Q. Do you know who claimed the suitcase with the clothes in it?

A. I think Mr. Rambo, it was his suitcase.

Q. Why did you arrest Mr. Rambo?

A. Well, the, Officer Beaumont advised me before he went on duty he searched the backseat of his vehicle and there was no narcotics found and he brought these subjects to headquarters and searched them again at which time he found the heroin.

Q. Well, when was — You never arrested — Didn't you arrest him on the scene?

A. Yes, sir.

Q. Why did you arrest him out there?

A. Possession of marijuana.

Q. Well, what were the facts that led you to believe that he was —

THE COURT: (Interposing) Mr. Achor, I believe he just went over that.

MR. ACHOR: I'm talking about Rambo.

THE COURT: I know, but he stated that Rambo got the suitcase and took it and put it in the cab, got it from Defendant Sanders over there. [T. 39]

Q. Is that why you arrested him?

A. Yes, sir.

Q. You arrested him then because Sanders handed him a suitcase and he put the suitcase in the car?

A. Yes, sir.

Q. That's all the knowledge you have of Rambo?

A. Yes, sir. I didn't know who he was.

Q. Plus, everything else the confidential informant had told you about Sanders only?

A. Yes, sir.

THE COURT: All right. Call your next witness.

MR. McARTHUR: I have one other question I failed to ask him.

FURTHER CROSS EXAMINATION
BY MR. McARTHUR

Q. Officer, Isom, when did you receive this information from the informant? When did you begin receiving the information, or did you just talk to him once?

A. I talked to this — About this particular case?

Q. Yes.

A. It was sometime earlier, a day or so earlier in reference to the green suitcase being sent. I contacted him twice on this particular day.

Q. At what time of day? [T. 40]

A. Once was in the morning and once, I think, was about an hour or so before the flight arrived.

Q. All right. You did not submit this to a judge for a search warrant?

A. No, sir. I did not.

MR. McARTHUR: That's all.

Q. (MR. McARTHUR, Continuing) One further question. Did you take any fingerprints from this suitcase?

A. No. I didn't.

Q. You didn't take any or there were none?

A. I didn't take any.

MR. McARTHUR: That's all I have.

FURTHER CROSS EXAMINATION
BY MR. ACHOR

Q. What about the rubber container that the heroin was in? Was it dusted for prints?

A. No, sir.

MR. ACHOR: That is all.

MR. McARTHUR: I haven't anything further of this witness, your Honor. [T. 41]

THE COURT: Let me get this straight, now. Did you see this Defendant Sanders claim the suitcase?

A. Yes, sir. He walked over and got the green suitcase, took it back over to Mr. Rambo, stood there and Mr. Rambo, he went and got in a taxicab. The crowd kind of dispersed and Mr. Rambo picked the suitcase up and went and got in the same taxicab with Mr. Sanders.

THE COURT: Okay.

MR. McARTHUR: Let me make one thing clear for record. I think everybody knows how the Little Rock Airport operates.

FURTHER CROSS EXAMINATION
BY MR. McARTHUR

Q. There is no claiming, is there? You don't show a ticket or anything to pick up baggage? Anybody could walk up and pick it up?

A. Yes, sir. That is correct.

THE COURT: Call your next witness.

(Witness Excused)

MR. MOORE: Officer Tuck. [T. 42]

THEREUPON,

DETECTIVE (CHARLES) TUCK, a witness called by and on behalf of the State, being first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION
BY MR. MOORE

Q. Would you state your name and occupation for the record, please?

A. Detective Tuck, Little Rock Police Department.

Q. Detective Tuck, were you so employed on April the 23rd, 1976?

A. Yes. I was.

Q. And, did you have occasion on that date to go to the Little Rock Airport?

A. Yes, sir. I did.

Q. Were you at the airport looking for a specific subject?

A. Yes, sir.

Q. And, who was that subject?

A. Lonnie Sanders.

Q. Do you see Mr. Sanders in Chambers today?

A. Yes, sir.

MR. MOORE: Let the record reflect he points to the defendant.

Q. (MR. MOORE, Continuing) All right, sir. Were you in the company of Detective Isom at this time? [T. 43]

A. Yes, I was.

Q. And, who else was with you?

A. Detective Mize.

Q. All right, sir. Where did you first view the defendant, Mr. Sanders that day?

A. When he got off of the plane and came out of the gate.

Q. All right, sir. And, did you keep him under observation in that area?

A. Yes, sir.

Q. And, what did you see him do?

A. He was waiting on a bag down there. He met a —

MR. McARTHUR: (Interposing) Objection to the con-

clusion, your Honor.

THE COURT: Sustained.

A. He met a subject downstairs, I believe. They picked up a green bag. He picked up a green bag and handed it to another black male that was with him, then they went to a cab.

Q. All right. Do you recall who went to the cab first?

A. Detective — Mr. Sanders.

Q. All right, sir. Well, did you know Mr. Sanders by sight when he got off of the plane? Did you know that is who you were looking for at that time?

A. I knew his name. I don't believe I knew him. [T. 44]

Q. All right. And, at the time you saw him meet this other gentleman down in the baggage area, did you know the other fellow at that time?

A. No, sir.

Q. All right. Subsequent to the time after the defendant, Mr. Sanders and the other fellow got into the cab, did you go with Detective Isom at that time to follow the cab?

A. Yes, sir.

Q. All right. And, were you involved with Detective Isom in the subsequent arrest of the two defendants?

A. Yes, I was.

Q. Did you have occasion to search either Mr. Sanders or

the other subject who turned out to be Mr. Rambo?

A. I don't remember. I may have patted down Mr. Sanders.

Q. Was anything, to your knowledge, found on either subject, on their person?

A. No, sir.

Q. And, after the arrest had been made, were the subjects transported to another location?

A. To the Vice and Narcotics Office.

Q. All right. Did you personally see this suitcase had been picked up at the airport?

A. Yes, sir.

Q. Did you see what was contained in this suitcase?

A. Ten plastic bags with green vegetable matter. [T. 45]

Q. All right, sir. And, did you also have occasion to see any other type of narcotic drug?

A. Later, Officer Beaumont got a condom filled with brown powder out of the backseat of his car.

Q. All right. Was that your total involvement with the arrest and the seizure of the drugs on that date?

A. Yes.

Q. Had you talked to this confidential informant any time that day or was all the conversation between Detective Isom and the informant?

A. I hadn't talked to him.

MR. MOORE: You may ask.

CROSS EXAMINATION
BY MR. McARTHUR

Q. Officer Tuck, do you recall looking at the airline tickets of either of these parties?

A. No, sir.

Q. Do you recall whether either of them had a baggage check stub on their possession?

A. I don't remember.

Q. Did you, was there anything else found in this green suitcase?

A. A pair of panties.

Q. A pair of panties. Belong to either one of these men, that you know of?

A. Not that I know of. [T. 46]

Q. All right. Is that all that was in there besides the ten bags of marijuana?

A. That's all I recall.

Q. All right. Was there any identification on this green bag at all? Initials or —

A. There may have been a claim check or something but I don't remember it.

Q. All right.

A. I know there wasn't any initials or name.

Q. Okay. Did you or anyone else to your knowledge check with American Airlines to see whether or not either of these individuals had in fact checked this bag at the point of origination?

A. I didn't. I don't know if anybody else did or not.

Q. How did you happen to know that this was Mr. Sanders getting off of the airplane? Did someone point him out to you and identify him?

A. Yes.

Q. Who was that?

A. Detective Isom.

Q. All right. How long do you suppose the Rambo subject stayed in the area of the baggage department, or whatever it is called down there, before he went out and got in the cab?

A. Ten or fifteen minutes.

Q. That long. All right. Were there other cabs parked in the [T. 47] area where the cab was that he got in?

A. I don't remember.

Q. At the airport don't they route cabs through a, where they all line up in one area with a starter that controls who gets in one cab or the other when they move out?

A. I don't know.

Q. In the main lobby where the baggage comes in there are doors directly across the building from the claim check area or wherever you pick up your baggage and one, it would be, I guess, directly South of that area, be the left as you face the baggage department. Is that correct?

A. Yes, sir.

Q. Which door did Mr. Sanders go out? Do you recall?

A. The South door.

Q. He went out the end door?

A. Yes, sir.

Q. All right. Which door did Mr. Rambo go out?

A. South door.

Q. All right. Is that where the cabs were?

A. That's where the cab they went in was. That's where their cab was, the cab they got into.

Q. Okay. Were there not a fairly large number of cabs in that area?

A. I don't remember.

Q. Do you recall whether or not this cab he got into was the [T. 48] first cab in line?

A. I don't remember. I don't remember seeing any other cabs out there.

Q. All right. How many policemen were there?

A. Three.

Q. Three of you?

A. Yes, sir.

Q. After you left the airport, did you call for additional assistance?

A. A black and white stopped the cab.

Q. All right. On your request? Yours or Isom's?

A. Yes, sir.

Q. All right. What did you do when you stopped the cab? What was done at that point?

A. We got the cab driver out and asked him if he'd mind opening his trunk, which he did, and we looked in the suitcase. We got Mr. Sanders out first and got him up against the cab and got the cab driver. He opened the trunk for us and when we opened, the first suitcase we opened was the one with the green vegetable matter in it, then we opened the other ones to check them.

Q. Did you find anything illegal in that?

A. No, sir.

Q. Do you recall whether there were any initials or anything on that, any identification of any sort on those bags? [T. 49]

A. No, sir. I don't believe there was.

Q. Did you ask either Rambo or Sanders' permission to search any of these bags?

A. I don't remember. I don't believe I even talked to them at all.

Q. All right. Did you have a search warrant?

A. No, sir.

Q. Oh, one other question. Did you have them under arrest at the time?

A. At what point?

Q. At the time you looked in the bags?

A. No, sir.

Q. They were arrested after that?

A. Yes, sir.

CROSS EXAMINATION
BY MR. ACHOR

Q. You say that you got Sanders out of the car, the cab and put him up against the cab?

A. Yes, sir.

Q. Did you do the same thing to Rambo?

A. Yes, sir.

Q. Did you search Sanders?

A. I believe I patted him down, but I don't recall.

Q. All right. Were you there when Isom searched Rambo?

A. Yes, sir. I would have been there. [T. 50]

Q. Did you search Rambo?

A. No, sir. I don't believe I did. Wait a minute. I believe that the uniformed officer patted Rambo down.

Q. He was there, too?

A. Yes, sir.

Q. When was Rambo there?

A. At the same time.

Q. After you found the marijuana?

A. Yes, sir.

MR. ACHOR: I don't have any further questions.

(Witness Excused)

THE COURT: Call your next witness.

MR. MOORE: Officer Mize.

THEREUPON,

OFFICER (RONNIE) MIZE, a witness called by and on behalf of the State (being first duly sworn), was examined and testified, as follows:

DIRECT EXAMINATION
BY MR. MOORE

Q. Will you state your name and occupation for the record, please?

A. Officer Mize, Little Rock Police Department. [T. 51]

Q. Officer Mize, were you so employed on April the 23 —

(THEREUPON, Ronnie Mize was duly sworn by the Court.)

THE COURT: Go ahead.

Q. Were you so employed on April the 23rd, 1976?

A. Yes, sir. I was.

Q. And, what division were you assigned to at that time?

A. Narcotics.

Q. All right, sir. On that date did you have occasion to go to the Little Rock Airport?

A. Yes, sir. I did.

Q. And, who was that subject?

A. Lonnie Sanders.

Q. Do you see Mr. Sanders in Chambers today?

A. Yes. I do.

MR. MOORE: Let the record reflect he points to the defendant.

Q. All right, sir. Where did you first observe Mr. Sanders on that date?

A. I was at the airport as he came out of Gate One.

Q. All right. Did you keep the subject under observation from that point on? [T. 52]

A. Yes, I did.

Q. And, where did he go when he came out of the gate?

A. He went to the baggage area where you pick up the baggage downstairs.

Q. All right, sir. Did he meet anyone in the baggage area?

A. Yes. He did. Another black male.

Q. All right. At that point did you know who this other black male was?

A. No. I didn't.

Q. All right, sir. And, what occurred after he apparently met with this black male?

A. They talked for awhile and the other black male went over and picked up the green suitcase, or Mr. Sanders picked up the green suitcase and give it to the other black male and left.

Q. All right. Mr. Sanders left?

A. Yes.

Q. All right. And then, what did the other black male do?

A. He went out and got in the cab.

Q. All right. Did you see where Mr. Sanders went, when you said he left?

A. He went to the cab.

Q. All right. Now, when you say the other black male that had the suitcase went to the cab, was this the cab that Mr. Sanders was in? [T. 53]

A. Yes.

Q. Did they leave the airport?

A. Uh huh.

Q. All right. Did you go with Detective Isom and Detective Tuck?

A. No. I stayed at the airport terminal because they run out and jumped in the car that followed the cab and I couldn't get to it, to the car.

Q. So, in other words, they left you behind?

A. Yes.

MR. MOORE: I have no further questions.

CROSS EXAMINATION
BY MR. McARTHUR

Q. So, you weren't there when the search was made?

A. No.

Q. Did you or anyone else to your knowledge check to see who might have had a baggage check on them?

A. I didn't.

Q. All right. You are aware the baggage on an airline has a check on it, a stub on it with a number? You don't recall anybody finding one of these on either one of the parties?

A. Well, I don't. I didn't search Mr. Sanders myself and I didn't check myself. I was left behind and didn't get there until later. [T. 54]

Q. All right. Now, you said one thing and you changed it.

You said that Mr. Sanders went over to the baggage area. Are you certain of that?

A. Uh huh.

Q. You're positive of that?

A. Uh huh.

Q. How long had they been standing there waiting before the baggage came, approximately?

A. Oh, I'd say five or ten minutes.

Q. Did Mr. Sanders have luggage in his hand?

A. I don't believe, I don't recall if he did or not.

Q. After Mr. Rambo had this green bag, how long did he wait around before he went out and got in the cab?

A. He went to the cab.

Q. At the same time?

A. No. He went first.

Q. Oh, Rambo went first?

A. Uh huh.

Q. Carrying the bag?

Q. Uh huh.

Q. And then, Mr. Sanders joined him later?

A. Uh huh.

Q. What was Mr. Sanders doing in the meantime?

A. He was just standing around for a few minutes and then he walked out. It wasn't for as long as a few minutes, just for a little while. [T. 55]

Q. You see the man sitting at the end of the couch here. Do you know who that is?

A. Uh huh.

Q. What is his name?

A. That is Lonnie Sanders. I knew his last name but his first name, I know him, I'd seen him before.

Q. All right. And that same man, the same man you are talking about at the airport?

A. Yes, sir.

Q. Okay. Do you know whether anybody checked with the airlines to see who may have checked luggage or may have shipped luggage or anything of that nature?

A. No, sir.

MR. McARTHUR: No further questions.

CROSS EXAMINATION
BY MR. ACHOR

Q. All you saw Rambo do was he handed the suitcase by Sanders and walk to the cab?

A. Yes, sir.

Q. You didn't know anything about him before that?

A. No.

Q. First time you ever had seen him or had any knowledge of him?

A. Yes, sir. [T. 56]

MR. ACHOR: That's all.

(Witness Excused)

THE COURT: Call your next witness.

MR. MOORE: When I learned of the hearing late Friday I subpoenaed Officer Beaumont. To my knowledge he was never served.

THE COURT: I think he's out there right now.

MR. MOORE: Did he show up?

MR. McARTHUR: I was told that he did.

(Pause in Proceedings)

THE COURT: He is not here. What did he do?

MR. MOORE: He was with the black and white unit that

pulled the cab over and —

THE COURT: (Interposing) Could probably stipulate to his testimony. [T. 57]

MR. McARTHUR: He is probably the one that searched Mr. Rambo, too?

THE COURT: He is probably the one that searched Rambo but —

MR. MOORE: (Interposing) Your Honor please, for the purposes of this hearing —

THE COURT: (Interposing) For the purpose of this hearing—

MR. MOORE: — I would stipulate that to my knowledge that nothing was found on Mr. Rambo's person. The heroin charge arose from the fact that he was transported in that unit and heroin was found after he had been transported in that unit, found in the unit itself, not on Mr. Rambo's person by Officer Beaumont.

THE COURT: Okay. We will take his testimony later.

MR. McARTHUR: I'm not sure it will have anything to do with this motion anyway. Have you rested?

MR. MOORE: I've rested. [T. 58]

MR. McARTHUR: Your Honor, I would like to recall Officer Isom for just a couple of questions.

THE COURT: All right.

MR. McARTHUR: After that, could I have about a two or three minute recess to check on one matter and let you know whether or not I want to call any further witnesses.

THEREUPON,

OFFICER DAVID ISOM, a witness called by and on behalf of the Defense, being first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION
BY MR. McARTHUR

Q. Officer, you're the same Officer Isom who testified earlier. Is that correct?

A. Yes, sir.

Q. You were placed under oath at that time. Is that right?

A. Yes, sir.

Q. Okay. Officer Isom, would you describe this green suitcase for us, please?

A. To the best of my knowledge, it's a large green Samsonite type suitcase, ordinary suitcase.

Q. Hard-finished type suitcase? [T. 59]

A. Yes, sir.

Q. Anything distinguishing about it?

A. Nothing.

Q. Was it dark green, light green?

A. Just a medium green, I believe.

Q. Standard color?

A. Yes, sir.

Q. Nothing unusual about it?

A. Just an ordinary green suitcase.

Q. All right. But there was nothing that would set that apart from any other green, Samsonite suitcase?

A. As far as suitcases go, no, sir.

THE COURT: Anything else?

MR. McARTHUR: That's all. As far as I'm concerned he can go.

(Witness Excused)

THE COURT: Call your next witness.

MR. McARTHUR: May I have a two or three minute recess, your Honor?

MR. MOORE: May the officers be excused? [T. 60]

MR. McARTHUR: As far as I'm concerned, they may be excused.

(THEREUPON, the hearing was in recess for ap-

proximately five minutes.)

MR. ACHOR: Judge, I don't know if they established any credibility for this informant and, therefore, I think that we ought to be entitled to the name and to examine him.

MR. McARTHUR: The only thing, the only testified concerning the informant —

THE COURT: Do you have any testimony?

MR. McARTHUR: No, I have no further testimony.

THE COURT: Okay.

MR. ACHOR: Of course, we won't finish that until we get Beaumont on.

THE COURT: We are finished, as far as the marijuana case is concerned, which is what I assumed we are trying.

MR. ACHOR: No, sir. They've got them charged in the same [T. 61] Information so, therefore, all they can convict him of is heroin in that case, isn't it?

THE COURT: Possession of marijuana with intent to deliver.

MR. McARTHUR: Your Honor, they have got one Information charging both men in one Information with possession of marijuana.

THE COURT: Sanders is obviously — I mean, that would — The proof, unless they've got something else, would be insufficient, as far as he is concerned on the heroin.

MR. McARTHUR: Well, they don't have him charged with the heroin but they have both offenses charged in the same indictment. They have them both charged with possession of a controlled substance with intent to deliver, to wit: Marijuana. And, in count two they charged David Earl Rambo with possession of heroin with intent to deliver.

THE COURT: Okay. Well, I'll —

MR. McARTHUR: (Interposing) We can't charge — I would have to object to trying that charge with my client there.

THE COURT: All right. I'll grant a severance then. That is what you are asking for? [T. 62]

MR. McARTHUR: Yes, sir.

THE COURT: All right. Count two will be severed, be reset on that date, the 3rd of February. All right. And, I find that in this case that the Motion to Suppress should be and is hereby denied. Be ready for trial then on Thursday.

MR. McARTHUR: Yes, sir, we're ready.

MR. ACHOR: On delivery of —

THE COURT: Delivery of marijuana.

MR. ACHOR: Possession with intent to deliver.

(THEREUPON, the hearing on Motion to Suppress was concluded.)

Exhibit No. 1
Text of Arkansas Supreme Court opinion
reported at Page 595, Arkansas Reports, Vol. 262

Lonnie James SANDERS *v.* STATE of Arkansas

CR 77-171 559 S.W. 2d 704

Opinion delivered December 19, 1977
(Division I)

Appeal from Pulaski Circuit Court, Fourth Division, *Richard B. Adkisson*, Judge; reversed and remanded.

McArthur & Johnson, for appellant.

Bill Clinton, Atty. Gen., by: *Robert J. Govar*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Justice. The fundamental inquiry to be made by the Court in this case is whether or not the warrantless search of appellant's suitcase by Little Rock Police officers is reasonable under the circumstances involved.

FACTS

Appellant, Lonnie James Sanders, was charged by information by the Prosecuting Attorney of the Sixth Judicial District with possession of a controlled substance (marijuana) with intent to deliver in violation of Act 590 of 1971, as amended.

The charge was the culmination of an intensive surveillance of appellant by the Little Rock Police Department, hereafter referred to as the police, just prior to and during his scheduled arrival at the Little Rock Municipal Airport on April 23, 1976.

The police had been advised by a confidential informant

some time prior to April 23, 1976, that appellant had sent an empty green suitcase to Dallas, Texas, on a flight and that in a day or two, appellant would go to Dallas to pick up the suitcase and that the suitcase would be containing marijuana.

On the morning of April 23, 1976, the informant advised the police that appellant would be arriving at the Municipal Airport of Little Rock, Arkansas, at 4:35 p.m. on April 23, 1976, and would deplane at Gate 1 and that appellant would have the green suitcase containing the contraband.[1] The police set up a surveillance at the Municipal Airport awaiting the arrival of appellant. As appellant exited Gate 1, appellant was observed carrying two bags and immediately existed the terminal and placed the two bags in the trunk of a waiting taxicab. Appellant returned to the luggage area inside the terminal and took a green suitcase from the luggage rack and passed it to one David Rambo. Appellant immediately left the terminal and got into the compartment of the cab. Rambo waited inside the terminal near the luggage area a few minutes and he subsequently exited the terminal and placed the green suitcase in the trunk of the cab and took a seat in the compartment of the vehicle. As the taxi departed the airport, the police followed in an unmarked vehicle. As the cab proceeded down East Roosevelt Road, a separate unit of the police, upon request of the officers following the taxi, stopped the taxicab and the officers following the cab requested the cab driver to open the trunk of the vehicle. Another officer directed appellant and Rambo to step out of the vehicle and stand to the side of the taxicab; police officers, without the consent of the appellant or Rambo, opened the green suitcase and found 9.3 pounds of marijuana. Appellant and Rambo were then placed under arrest and appellant was placed in one police unit and Rambo in another and were taken to the Little Rock Police Department.

On January 31, 1977, a hearing was conducted on

[1]The informant had supplied information to the police in the past which had proven to be reliable and rewarding in the police's effort to cope with the drug problem.

appellant's Motion to Suppress the evidence which was denied by the trial court.

On February 3, 1977, appellant was found guilty by a jury as charged and was given ten years in the Department of Correction and a fine of $15,000.00.

APPELLANT'S CONTENTIONS

Appellant alleges the following as the grounds for reversal of his conviction:

1. The trial court erred in denying appellant's Motion to Suppress the evidence gained as a result of an illegal search.

2. The trial court erred in allowing the co-defendant to present evidence of a statement allegedly made by appellant and further erred in allowing the co-defendant to present rebuttal evidence directed toward appellant.

3. The trial court erred in admitting into evidence the subject of this charge when it was not properly identified.

THE SEARCH

Appellant's contention that the warrantless search of his green suitcase, under the existing circumstances, was unreasonable and consequently in violation of the Fourth Amendment to the United States Constitution has merit. We conclude that the trial court erred in denying appellant's Motion to Suppress the evidence confiscated from the suitcase and, therefore, appellant's conviction is reversed.

It is well recognized that warrantless searches are per se unreasonable unless they fall within some established exception to the warrant requirement of the Fourth Amendment to

the United States Constitution. One of these exceptions is probable cause coupled with exigent circumstances. But probable cause alone is insufficient for a warrantless search to square the mandate of the Fourth Amendment against unreasonable searches. *United States* v. *Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022; *Horton* v. *State*, 262 Ark. 211, 555 S.W. 2d 226; *Perez* v. *State*, 260 Ark. 438, 541 S.W. 2d 915.

The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it. For the confidential informant, who had supplied reliable information in the past, had advised the police of appellant's mode and manner of transporting marijuana into the state; the police were given the type and color of the suitcase that was being used by the appellant; the approximate date that the empty suitcase was sent to Dallas was supplied to the police; the date and time of appellant's arrival at the Little Rock Municipal Airport was within the immediate knowledge of the police; the name of the commercial airline, as well as the flight number that appellant would be traveling on was revealed to the police by the informant; and the police were also told the gate number that appellant would exit when he deplaned.

Moreover, appellant, at the time, was a resident of Little Rock and was no stranger to the police. The search of the green suitcase can not be justified under the "automobile exception" as claimed by the State. It must also be remembered that appellant's mode of transportation from the Little Rock Municipal Airport was by a local taxicab; the green suitcase was locked in the trunk of the taxicab[2]; the police took posses-

[2]The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental, and the suitcase was not a part of the area from which appellant might gain possession of a weapon or destroy the evidence contained in the suitcase. See: *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

sion of the suitcase while appellant was in the compartment of the taxicab and appellant was later taken into immediate custody and placed in a police car; the confiscation of appellant's suitcase took place shortly after 4:35 p.m. in a metropolitan area. Indeed, there is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant, or support the State's contention that "mobility of the object to be searched (the green suitcase)" justified a warrantless search. See: *Perez* v. *State*, supra; *Tygart* v. *State*, 248 Ark. 125, 451 S.W. 2d 225, cert. den. 400 U.S. 807, 91 S. Ct. 50; *Coolidge* v. *New Hampshire*, supra.

To paraphrase the Unied States Supreme Court's observation in *United States* v. *Chadwick*, supra, the factors which diminish the privacy aspects of an automobile do not apply to appellant's suitcase. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Nor does the suitcase's mobility justify dispensing with the added protections of the Warrant Clause. Once the Little Rock police had seized appellant's suitcase from the trunk of the taxicab and had the suitcase under their exclusive control, there was not the slightest danger that the suitcase or its contents could have been removed before a valid search warrant could be obtained. The initial seizure of appellant's suitcase, the validity of which appellant does not contest, was sufficient to guard against any risk that evidence might be lost. With the suitcase safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

CO-DEFENDANT OFFERS AS EVIDENCE STATEMENT ALLEGEDLY MADE BY APPELLANT

Over strenuous objections of appellant, on the grounds of relevancy, the trial court permitted Jonas Rambo to offer the following evidence in support of appellant's co-defendant, David Rambo. "He (appellant) told me if I'd let David (the co-defendant) take the rap for a year, he'd get him out of jail. First told me he had a lawyer for both of them, then went to court and found he didn't have a lawyer for David, but he told me if I'd let David take the rap for both of them he would go ahead. He'd make enough money to get a good lawyer and get him out."

We hold that the trial court did not commit error in admitting this testimony inasmuch as the testimony was quite relevant inasmuch as David Rambo, in testifying in his own behalf, corroborated the testimony of law enforcement officers as to what transpired at the airport after appellant and the co-defendant arrived from Dallas. It was David Rambo's contention that appellant was completely unknown to David Rambo before the two men met at the Dallas, Texas, airport, while on the other hand, appellant claimed that he and David Rambo were cousins, and that he had no knowledge that the suitcase contained marijuana, but he had agreed to carry the bag once the two reached Little Rock in return for $5.00 that appellant had agreed to pay him. It is obvious that David Rambo was seeking to convince the jury that he had participated in the drug running operation unknowingly and that his only function in the scheme was to take the rap for appellant in this case appellant's activities were exposed and criminal charges resulted. Moreover, appellant specifically claimed that he had never seen the suitcase containing the drugs until Rambo placed the suitcase in the taxicab to be used in leaving the airport. In addition, Jonas Rambo supported his son's (David Rambo) testimony and rebutted the testimony of appellant. Jonas Rambo testified that, contrary to appellant's contention, the two defendants were not related. See: Rule 401, Arkansas Uniform Rules of Evidence.

Appellant also claims that the trial court committed error in permitting Jonas Rambo to testify in behalf of his son, David Rambo, after David Rambo and appellant had completed presenting evidence in support of their respective cases. This contention is without merit inasmuch as it is well settled that a large discretion is vested in the trial judges as to the time of introducing testimony. Consequently, reversals will not be ordered unless it is shown that this discretion has been abused to the prejudice of the objecting party. No prejudice has been demonstrated. See: *Marks* v. *State*, 192 Ark. 881, 95 S.W. 2d 634.

Reversed and remanded.

We agree: HARRIS, C.J., and FOGLEMAN, HOLT, and HICKMAN, JJ.

Exhibit No. 2
Text of Appellant's Argument, Point No. 1,
in Brief Submitted to Arkansas Supreme Court

Supreme Court of Arkansas

Lonnie James Sanders .....*Appellant*

vs. No. CR 77-171

State of Arkansas .....*Appellee*

APPEAL FROM
PULASKI COUNTY CIRCUIT COURT
FOURTH DIVISION
Hon. Richard B. Adkisson, *Judge*

ABSTRACT AND BRIEF
FOR APPELLANT

McARTHUR AND JOHNSON
Suite 500 - 300 Spring Building
Little Rock, Arkansas 72201
Attorneys for Appellant

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ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE GAINED AS A RESULT OF AN ILLEGAL SEARCH.

Officer David Isom received information from a confidential informant that appellant had sent a green suitcase to Texas. A few days later, on April 23, 1976, he was again in contact with the informant and was told that appellant was returning from Texas by airline and would arrive at the Little Rock Airport at 4:35 PM. The source of the informant's information was hearsay (T. 30). The officer did not attempt to verify the information in any way, but relied on the fact that the informant had previously given reliable information that led to misdemeanor convictions. Further the officer did not attempt to obtain a search warrant for appellant or for whatever he might have in his possession upon his arrival.

At 4:35 PM on April 23, 1976, Officer Isom and others observed appellant deplane and make his way through the airport to a cab outside, where he deposited the two bags he was carrying. They then

observed him return to the baggage claim area and meet co-defendant Rambo. They testified that he then took a green suitcase from the rack and handed it to Rambo and then left. Rambo shortly left the area and entered the same cab after placing the green suitcase in the trunk of the cab. The cab was shortly stopped, the suitcase seized, opened and searched and marijuana was found. Appellant was then arrested and charged.

Involved herein is a warrantless search of the persons and personal properties of appellant and his co-defendant. Even though a vehicle was involved here, this is not a vehicular search as contemplated in the usual cases. In this case, the usual "exigent circumstances" surrounding the search of a vehicle are not present. The officers had a great deal of prior information concerning the situation and had ample time to obtain a search warrant had they sought one. A complete search of the transcript will reveal no explanation as to why the officers determined that a warrant was unnecessary. In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 Sup. Ct. 2022, it was stated that a warrantless seizure is not justified unless exigent circumstances excuse the failure to obtain a warrant. In *Perez* v. *State*, 260 Ark. 438, 541 S.W. 2d 915, it was stated that warrantless searches of an automobile can be justified because of the mobility factors where other

warrantless searches would be unreasonable. Appellant maintains exigent circumstances to be absent in this case excusing the failure to obtain a warrant.

The only other possible justification for the search herein would be that it was associated with a lawful arrest. Police can arrest lawfully if they have reasonable cause to believe that the person has committed a felony or if any offense is committed in his presence. Rule 12.1 of the Arkanaas Rules of Criminal Procedure allow a warrantless search incidental to a lawful arrest to obtain evidence of a crime or to seize contraband. However, Rule 12.2 limits the scope of such search to the person of the defendant and personal property within his immediate control. Appellant maintains that the officers herein lacked reasonable cause to believe that appellant was committing a felony and they did not observe the commission of any type of offense in their presence. The sole ground upon which they acted was the relaying of hearsay information by an informant who had in the past provided some minor information that had proved to be reliable. No effort was made by the officers to verify any of the information except their observation of appellant arriving at the airport. The police had no idea from where the informant had gotten his information and, even though they could have feasibly done so, they took no

steps to support the reliability of the informant by independent investigation as required. Even if the arrest was proper, apparently Rule 12.2, supra, would not justify this seizure and carte blanche search.

Appellant maintains that the search and seizure herein is patently unreasonable and further is unreasonable in that the police determined not to get a warrant even though there was ample time to do so. For this reason, appellant maintains prejudicial error to have been committed and prays the Court reverse his conviction.

Exhibit 3
Text of Appellee's Argument, Point No. 1,
in Brief Submitted to Arkansas Supreme Court

Supreme Court of Arkansas

Lonnie James Sanders .....*Appellant*

vs. No. CR 77-171

State of Arkansas .....*Appellee*

AN APPEAL FROM
PULASKI COUNTY CIRCUIT COURT
FOURTH DIVISION
Hon. Richard B. Adkisson, *Judge*

BRIEF FOR APPELLEE

BILL CLINTON
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By: ROBERT J. GOVAR
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Attorneys for Appellee

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ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF A LEGAL SEARCH OF A VEHICLE.

Appellant Lonnie James Sanders was convicted of possession of 9.3 pounds of marijuana with intent to deliver, in violation of Ark. Stat. Ann. § 82-2617(a)(1)(ii). Prior to trial appellant filed a motion to suppress the use at trial of the marijuana on the grounds that the evidence was obtained as a result of an unlawful search and seizure. After an evidentiary hearing, the trial court denied appellant's motion to suppress.

The search objected to was lawful, even though no search warrant had ever been issued, as a search based on probable cause and the exigent circumstances existing, which obviated the necessity for obtaining a search warrant.

Acting on information received from a reliable informant, members of the Little Rock Police Department staked out the Little Rock Airport. The

officers observed their suspect, appellant, and his codefendant Rambo disembarking from an American Airlines flight from Dallas, Texas. (T. 73, 74, 75)

The two men were observed retrieving a green suitcase from the baggage area, then leaving the airport in a taxicab. A few blocks away, the taxicab was stopped by the law enforcement officers. The resulting search of the vehicle revealed that the green suitcase contained 9.3 pounds of marijuana. (T. 75, 76)

Admittedly the officers did not obtain a search warrant prior to stopping and searching the vehicle and seizing the illicit drugs. On appeal appellant argues that the warrantless search of the vehicle was illegal and that the marijuana seized as a result of that search was improperly admitted into evidence.

The Fourth Amendment to the United States Constitution does not act as a total ban on searches and seizures, only those searches and seizures which are unreasonable. *Carrol* v. *United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Maxwell* v. *Stephens*, 229 F. Supp. 205, affirmed 348 F. 2d 325, cert. denied 86 S. Ct. 532, 382 U.S. 1000, 15 L. Ed. 2d 490 (1964).

The absence of a search warrant does not necessarily render the search and seizure unreasonable. If the search and seizure were based on probable cause and there existed exigent circumstances which made obtaining a warrant prior to conducting the search impractical and unreasonable, then the search and subsequent seizure were reasonable and were not unlawful. *Chambers* v. *Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *Carrol* v. *United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *United States* v. *Pollard*, 466 F. 2d 1 (10th Cir. 1972), cert. denied, 409 U.S. 1127, 93 S. Ct. 946, 35 L. Ed. 2d 259 (1973). The search in the present case involved the search of a motor vehicle. Warrantless searches of automobiles, because of their mobility, may be reasonable, when under the same circumstances, the search of a home, store or other stationery property would not be. *Cooper* v. *California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967); *Brinegar* v. *United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); Perez v. *State*, 260 Ark. 438, 541 S.W. 2d 915 (1976).

The mobility of the object to be searched is a significant factor to consider in determining whether exigent circumstances are present and justify a warrantless search of that object. Warrantless searches of vehicles under exigent cir-

cumstances are specifically authorized by Rule 14.1 of the Arkansas Rules of Criminal Procedure.

Appellant properly cites *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) for the proposition that a warrantless search of a vehicle is unconstitutional unless exigent circumstances are present which make it impracticable to obtain a warrant.

However, the present case is clearly distinguishable on its facts from the *Coolidge* case, *supra*, relied on by appellant for reversal. The vehicle searched in the present case, unlike the one searched in *Coolidge, supra*, was known to be used for an illegal purpose, the transporting of illicit drugs, just prior to the time it was stopped and searched by the officers. In *Coolidga, supra*, the police had known for some time of the role of the vehicle in the crime being investigated. Here the officers did not realize that the taxicab would be used to transport illicit drugs until a few minutes before the search occurred. In the *Coolidge* case the vehicle searched was immobile and the defendant charged had no present control over the vehicle or its contents. In the present case, the vehicle was moving about the streets of Little Rock, with no apparent restraint on its movement. Within the time needed to secure a search warrant for the vehicle, the

marijuana could have easily been destroyed or distributed. *Coolidge, supra,* clearly is inapplicable to the fact situation of the present case.

It is appellant's contention that the police officers had probable cause and adequate opportunity to secure a search warrant prior to the search, and therefore exigent circumstances, which normally give validity to a warrantless search of a vehicle, were not present in this case. (Appellant's brief p. 48)

Assuming, and appellee certainly does not concede, that a search warrant could have been secured prior to appellant's arrival at the airport with the illicit drugs, that fact alone would not have nullified the exigent circumstances which arose when appellant sought to transport the illicit drugs in the taxicab.

In *Williams* v. *State*, Del. Supr. 331 A. 2d 380 (1975), officers, acting on information obtained through an authorized wire tap, staked out a motel room anticipating that a heroin delivery would be made there. The officers delayed securing a search warrant until their suspicions were corroborated by observation at the motel. At the point in time when their suspicions were corroborated, it became apparent that the suspects had completed their

negotiation and the suspects would soon be leaving with the goods. At this time exigent circumstances arose which required the officers to act without delay.

There, the court ruled that the warrantless search of the motel room was proper, and the fact that the officers intended to first secure a warrant, but failed to do so, did not render invalid the exigent circumstances which subsequently occurred and necessitated the warrantless search. See also *Thomas* v. *Parret*, 524 F. 2d 779 (8th Cir. 1975).

United States v. *Ramirez*, 513 F. 2d 72 (5th Cir. 1975) found that a warrantless search of a truck transporting marijuana was not unreasonable when DEA agents had knowledge of facts, four days prior to the search, which would have supported issuance of a search warrant. The court ruled that the fact that the DEA agent in charge may have had both sufficient time and probable cause to have obtained a warrant to search appellant's truck at some time earlier had no bearing on whether exigent circumstances existed at the time the agents conducted a warrantless search of the vehicle.

United States v. *Sigal*, 500 F. 2d 1118 (10th Cir. 1974) involved the warrantless search of an airplane which was being used to transport marijuana. The

court ruled that although the agents had sufficient probable cause to seek a search warrant at an earlier stage of the investigation, but failed to do so, they were not precluded from conducting the search somewhat later when exigent circumstances justified the search without a warrant.

The marijuana properly admitted into evidence in the present case was seized as a result of a lawful and reasonable search of the vehicle in which appellant was a passenger. Such a search and seizure is supported by case law and Rule 14.1 of the Arkansas Rules of Criminal Procedure when the officers are acting on probable cause and exigent circumstances are present which make obtaining a search warrant impracticable.

Probable cause in the present case consisted of the information provided the officers by a reliable informant and the observation by the officers at the airport which corroborated the informant's story.

Exigent circumstances arose when appellant, and codefendant Rambo, along with the suitcase containing the drugs, left the airport in the taxicab. At this time the drugs were in a mobile state and the two men could have easily distributed or destroyed the illicit goods if the arresting officers had not acted immediately.

Under these circumstances the resulting search and seizure were lawful and not unreasonable and the evidence obtained from the search was properly admitted into evidence at appellant's trial.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

STATE OF ARKANSAS ..... *Petitioner*

vs.

LONNIE JAMES SANDERS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

I. OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 262 Ark. 595, 559 S.W. 2d 704 (1977) and is attached in the Appendix.

II. JURISDICTION

The opinion of the Arkansas Supreme Court was filed December 19, 1977. Petitioner's petition for rehearing was denied by that court and the judgment was entered on January 23, 1978. This Petition for a Writ of Certiorari was filed within ninety days of that date. Jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

III. QUESTION PRESENTED

Whether a warrantless search of both an automobile trunk and an immediately warrantless search of an unlocked suitcase found therein where the search of both is based on probable cause and exigent circumstances is reasonable and lawful under the Fourth Amendment to the Constitution of the United States.

IV. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V. STATEMENT OF THE CASE

On Friday, April 23, 1976, Officer David Isom of the Little Rock Police Department Narcotics Squad, acting upon information provided by a confidential informant (T. 25-29), went to the Little Rock Municipal Airport to set up surveillance for the respondent, Lonnie James Sanders. (T. 25, 72) According to the informant, respondent was scheduled to arrive that afternoon in Little Rock on an American Airlines flight from Dallas, Texas at 4:35 p.m.. with a green suitcase carrying marijuana. (T. 31) The informant told Isom that respondent had sent an empty green suitcase to Dallas for the purpose of transporting marijuana back to Little Rock. (T. 31) Accompanied by two other plainclothes officers, Isom observed Sanders get off the 4:35 p.m. Dallas flight and proceed to the baggage claim area of the terminal where Sanders met David Rambo. (T. 26, 74) From a distance, the officers observed respondent wait at the baggage area and pick up a green suitcase. He handed it to Rambo, and he walked to the nearby cab stand and got in a taxicab. (T. 26, 74) Rambo remained in the baggage area for a few moments until the surrounding crowd dispersed, and then he got in the taxicab with respondent. (T. 27, 76, 86) Rambo placed the green suitcase in the trunk of the taxicab (T. 93) and the cab left the airport.

Officer Isom and one of the others followed the taxicab as it proceeded down East Roosevelt Road, a major arterial in Little Rock. (T. 27, 76) The officers had requested assistance from a marked police unit over their radio. The other police car stopped respondent's taxicab on East Roosevelt several blocks from the airport. (T. 47, 76) The cab driver was asked out of the cab and to open his trunk, and he did. Respondent and Rambo were taken out of the cab by the police and placed against the side of the vehicle. (T. 48) They were not placed under arrest at that point. (T. 48) In the trunk the officers found the green suitcase, and, without seeking anyone's consent, they opened it. (T. 35) It was unlocked. (T. 35) In the suitcase they found what they suspected was (T. 43), and later proved to be, 9.3 pounds of marijuana. (T. 147) Respondent Sanders and Rambo were arrested and transported to the police department. (T. 43) The cab driver was released.

On October 14, 1976, Sanders was charged by felony information with possession of marijuana with intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976), the Uniform

Controlled Substances Act. Sanders' motion to suppress the evidence found in the suitcase was denied after a hearing held January 31, 1977. (T. 7) Sanders was tried by a jury and found guilty on February 3, 1977 and sentenced to ten years in the state penitentiary and fined $15,000. (T. 8, 9)

On appeal to the Arkansas Supreme Court, the conviction was reversed because the search was held unreasonable under the Fourth Amendment to the United States Constitution.[1] *Sanders* v. *State*, 262 Ark. 595, 559 S.W. 2d 704 (1977), Appendix A.

The court first held there was probable cause for the police to believe there was a controlled substance in the green suitcase when it was seized and searched under the Fourth Amendment. The confidential informant gave detailed information about the respondent's arrival at the Little Rock Airport on April 23, 1976 (and the police corroborated all the details from the informant by personal observation at the airport).

The court next held the search was not justified under the automobile exception because the police took possession of the suitcase even though the cab was on the street.

> "[T]here is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant, or support the State's contention that 'mobility of the object to be serrched (the green suitcase)' justified a warrantless search. See: • • • *Coolidge* v. *New Hampshire* [403 U.S. 443]." *Id.*, at 600, 559 S.W. 2d at 706.

[1]The decision was based solely on the Fourth Amendment to the United States Constitution. There were no state grounds involved. *Sanders* v. *State*, 262 Ark. 595, 599, 559 S.W. 2d 704, 706 (1977).

The court added that there was a substantially greater expectation of privacy in a suitcase than an automobile under the Fourth Amendment, and the suitcase was sufficiently out of reach not to be within the search incident to an arrest doctrine. *Ibid.*

The court finally stated that once the police had the suitcase in their control, there was no longer any danger of loss or destruction of evidence, and a warrant should have been obtained.

> "The initial seizure of appellant's suitcase, the validity of which appellant does not contest, was sufficient to guard against any risk that evidence might be lost. With the suitcase safely immobilized it was unreasonable to undertake the additional and greater intrusion of a serrch without a warrant." *Id.*, at 601, 559 S.W. 2d at 707.

The court was apparently holding that on seizure of the suitcase by the police on the street, exigent circumstances ceased to exist even if there were exigent circumstances for seizure of the vehicle. (Compare *id.*, at 599, 559 S.W. 2d at 706.) Therefore, a warrant was required under the Fourth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

A.

The Arkansas Supreme Court erred in holding that the warrantless search of the green suitcase was unreasonable. The court ignored the facts, petitioner's argument and Constitutional precepts, as well as common logic in its efforts to

fit the facts of this case within the ambit of *United States* v. *Chadwick*, 433 U.S. 1 (1977). The court concluded that the officers had probable cause to believe that the taxi and the suitcase within contained contraband and that the officers were justified in stopping the taxi on the busy street during Friday rush hour traffic. They erroneously concluded, however, that there were no exigent circumstances to justify a warrantless search. Further, in its determined effort to stretch *Chadwick* to fit this case, the court misconstrued, added to and ever created argument and fact in order to make the language of *Chadwick* fit the facts here. In short, the opinion is irrational in light of the facts and incorrectly applies *Chadwick*.

B.

The search here was clearly reasonable as being made under the automobile exception to the warrant requirement of the Fourth Amendment. This Court has created what has come to be called the "automobile exception", which deems reasonable warrantless searches of cars when there is probable cause to believe that they contain contraband and exigent circumstances surrounding the mobility of the automobile precludes or makes impractical the obtaining of a search warrant. The facts of this case bring it squarely within the ambit of the automobile exception. Here, the officers had probable cause to believe that the respondent's green suitcase contained contraband and was located in the trunk of the taxicab; that the taxi was carrying the respondent, the suitcase and an accomplice who had not been known to the officers until just moments before, away from the airport during Friday afternoon rush hour traffic. These factors clearly made the brief street-side stop and search of the taxi and the discovery of the contraband in the suitcase reasonable pursuant to the automobile exception.

C.

The Arkansas Supreme Court based its decision upon *United States* v. *Chadwick, supra*. *Chadwick* did not deal with an automobile exception case, but rather with a rejection of an attempt to create a new exception to the warrant requirement of the Fourth Amendment for personalty in the possession of an arrestee. This attempted exception would have allowed the warrantless search of personalty due to its mobility and would have amounted to an extension of the rationale of the automobile exception beyond automobiles. The *Chadwick* decision did not vitiate reasonable searches made pursuant to the automobile exception, nor did it restrict the limits of a legitimate automobile exception search. To extend the holding of *Chadwick* to so do would be error and that is precisely what the Arkansas Supreme Court did.

ARGUMENT

A.

THE ARKANSAS SUPREME COURT ERRED IN HOLDING THE WARRANTLESS SEARCH OF THE RESPONDENT'S GREEN SUITCASE TO BE UNREASONABLE.

The Arkansas Supreme Court erred in holding that the search of the respondent's green suitcase was unreasonable. In making its ruling, the Arkansas Supreme Court noted the exception to the warrant clause of the Fourth Amendment upholding warrantless searches as reasonable where there is probable cause coupled with exigent circumstances. The court examined the facts of the case and held that, while the officers did have probable cause to believe that respondent's green suitcase contained contraband, the search was nevertheless invalid under the rule of *United States* v. *Chadwick*, 433 U.S. 1 (1977), in that there were no exigent circumstances. *Sanders* v. *State of Arkansas*, 262 Ark. 595, 559 S.W. 2d 704, 706 (1977). The petitioner agrees with the Arkansas court's finding of probable cause, but disagrees with its overbroad application of *Chadwick* so as to negate a finding of exigent circumstances.

In the case at hand, the Arkansas court had no problem in finding probable cause for the police to believe that Sanders's green suitcase contained marijuana. The informant, whose reliable information in the past had led to three previous convictions of Sanders for narcotics violations, contacted the police on Friday, April 23, 1976, and gave most detailed information about Sanders's expected arrival at the Little Rock Airport on that same day. (T. 25-31, 72)

The informant had stated that the respondent would be arriving in Little Rock on the 4:35 p.m. American Airlines flight from Dallas at Gate 1 and would have a green suitcase full of marijuana. (T. 25-31) This information was corroborated by the officers' personal observation of the respondent at the airport and probable cause culminated with respondent's picking up of his green suitcase at the baggage claim area, giving it to his confederate, Rambo, and their departure in a taxi.

The Arkansas court implicitly held that the officers did have probable cause, and that exigent circumstances were present such as to make reasonable the seizure of the taxi, the search of the cab for the suitcase, and the seizure of suitcase. The court held, however, that pursuant to *United States* v. *Chadwick*, *supra*, the exigent circumstances which would have made reasonable a warrantless search of the unlocked suitcase were totally dissipated when the officers gained control of the luggage on the street. *Sanders* v. *State of Arkansas*, *supra*, 559 S.W. 2d at 706; Petition for cert. at 5(a).

Chadwick dealt with the warrantless seizure of a 200 pound double-locked footlocker by federal agents as it was being placed into the open trunk of a parked car whose engine was not running. 433 U.S. at 4. The defendants were arrested and they and the trunk were taken to the federal building where the footlocker remained under the exclusive control of the federal agents. An hour and a half after the arrest and seizure, the agents conducted a warrantless search of the footlocker in the federal building. *Id.*

The government in *Chadwick* put forth three theories in attempting to justify the search. The first, which it raised only at the district court level, was that the search was reasonable

pursuant to the automobile exception to the warrant requirement. The district court rejected this argument based upon the facts surrounding the seizure, noting that the connection between the auto and the footlocker was "merely coincidental." 433 U.S. at 5.

The other two theories which the government employed were that the search was incident to a valid arrest and that because of the inherent mobility of the footlocker, the search was justified. As to the former, the Court held that warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest if the search is remote in time or place from the arrest or no exigency exists. Going further, the Court noted that .

> "once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is *no longer an incident of arrest.*" 433 U.S. at 15 (emphasis supplied).

In the "mobility of luggage" argument, the government sought to break new ground by creating a new exception to the Fourth Amendment closely analogous to the automobile exception. 433 U.S. at 11, 12. After discussing the automobile exception and its rationale as well as giving a discussion of the role of the luggage, the Court rejected creation of the government's luggage mobility exception based on the facts of the case:

> "Once the federal agents had seized it [the footlocker] at the railroad station and had safely taansferred it to the

> Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained." 433 U.S. at 13.

Thus, the Court refused to adopt a "mobility exception" to the Warrant Clause of the Fourth Amendment where the 200 pound double-locked footlocker not only had been seized but also had been in the exclusive custody of the agents at the federal building for an hour and a half prior to its warrantless search.

Given the facts and holding of *Chadwick*, the Arkansas Supreme Court erroneously applied *Chadwick* to the search of the respondent's green suitcase in deeming that search unreasonable. Petitioner's sole contention before the Arkansas Supreme Court was that the search of the suitcase was a reasonable one under the automobile exception to the warrant requirement pursuant to *Carooll* v. *United States*, 267 U.S. 132 (1925); and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). The reasons for such will be fully set forth in Part B of this argument.

Given this fact, the Arkansas Supreme Court dismissed petitioner's argument in a misdirected attempt to bring the case within the ambit of *Chadwick*. In so doing, the Arkansas court erroneously employed the language and rationale of *Chadwick*, used to refute an attempted extension of search incident to a lawful arrest doctrine and the creation of a "mobility doctrine," to totally dissipate the real exigent circumstances of a reasonable search under the "automobile exception". In this regard, it must be noted initially that a search incident to arrest and an automobile exception search are as different as night and day. So, too, are the exigencies which legitimize the

searches under each doctrine. The exigency behind a search incident to an arrest is primarily for the protection of the arresting officer. It is reasonable for him, in making his arrest, to protect himself by searching the person arrested for weapons which the the arrestee might use to resist or escape. *Pennsylvania* v. *Mimms*, 434 U.S. 1;6 (1977). The "search incident" doctrine also allows the officer to search the immediate area into which an arrestee might reach to grab a weapon or destructable evidence. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

The exigencies which make a search reasonable pursuant to the automobile exception to the warrant requirement, on the other hand, are quite different indeed. This doctrine is premised upon the realization that contraband goods are often concealed and transported in automobiles or other vehicles and that the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable and that the opportunity to search is fleeting since a car is readily movable. *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51.

Thus, as apples and oranges are both fruit but totally different, so the only common touchstone of the search incident doctrine and the automobile exception to the Warrant requirement is the preservation of evidence sometimes found in a search at the time of an arrest. Apart from that, they are different doctrines with different factors and criteria for the employment and rejection of each.

With this in mind, it can readily be seen how the Arkansas Supreme Court, in its over-eager erroneous attempt to bring the case within *Chadwick*, misconstrued the facts and misquoted

petitioner's argument, and misapplied this Court's ruling in *Chadwick*.

Here, the Arkansas Court erroneously disposed of the automobile exception which was petitioner's sole justification for the search. The court held that, even though respondent and the suitcase had left the airport traveling in a taxi, the relationship between the suitcase and the taxi was "coincidental." (Compare, 559 S.W. 2d at 706, fn. 2, *with* 433 U.S. at 5.) Petitioner submits that the relationship here is substantial and is a far cry from the "coincidental" relationship of the footlocker and the car found in *Chadwick*, 433 U.S. at 4, 5, where the footlocker had just been placed into the open trunk of the parked car whose engine was not running.

The Arkansas court went on to find, implicitly if not explicitly, that, while there was probable cause to stop the taxi and exigent circumstances to justify a warrantless search and seizure of the taxi, there were no exigent circumstances present to justify the warrantless search of the suitcase found in the taxi, based upon *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Petitioner notes that *Coolidge* refused to find exigent circumstances present to justify a warrantless automobile search, based upon some eight factors, one of which was that the car in question was parked in the driveway of the home, that it was immovable, and that the search took place well after probable cause was found. 403 U.S. at 460-464. Petitioner also notes that in stressing the necessity of exigent circumstances, the Court in *Coolidge* distinguished between the car there and those in *Carroll* v. *United States*, *supra*, and *Chambers* v. *Maroney*, *supra*, which had been stopped on a highway. 403 U.S. at 459-460. It seems clear that the Arkansas court's reliance upon *Coolidge* is ill-founded.

Apparently, the Arkansas court felt that, having made a valid seizure of the taxi, having conducted a valid search of the cab, and having made a valid seizure of the suitcase, the officers should have then taken the respondent, his confederate, the suitcase and maybe the cab driver to the police station and obtained a warrant. While petitioner will deal with this point more fully in Part B, suffice it to say that this is exactly the circumstance discussed by the Court in *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52.

Petitioner takes particular umbrage at the Arkansas court's erroneous statement that petitioner contended that "the mobility of the object to be searched (the green suitcase) justified a warrantless search." *Sanders* v. *State of Arkansas, supra,* 559 S.W. 2d at 706. This was never argued in the Arkansas court. (See petitioner's brief in Appendix) The court then used this alleged contention to springboard into a mirror of the *Chadwick* rejection of the "mobility doctrine," 433 U.S. at 13. Petitioner's sole contention on this point has always been that the search was reasonable pursuant to the automobile exception, and it did not allege or even allude to that which the court quoted.

While the petitioner will discuss this area more fully in Part B, it cannot help but note that the doctrine and phraseology employed here by the Arkansas court is questionable. It was utilized by this Court, in *Chadwick,* to note that once the double-locked, 200 pound footlocker had been seized and transferred to the federal building, a warrant could then have been obtained. The validity of this rationale certainly cannot be denied when applied to the facts in *Chadwick,* where the automobile exception was not asserted by the government. It is highly questionable whether it is equally applicable to the facts in *Sanders* where: (1) the automobile exception, rather than the mobility doctrine, is

the *only* ground asserted by petitioner to justify the search; (2) the search had been contemporaneous to the seizure, rather than an hour and a half subsequent by petitioner to justify the search; (3) we are confronted with a suitcase which was unlocked, rather than a 200 pound, double locked footlocker; (4) the suitcase had not been removed from the situs of the seizure; (5) it is questionable whether the officers had the suitcase under their exclusive control prior to the search; and (6) contrary to the court's assertion, the respondent did contest the validity of the initial seizure of his suitcase. (See respondent's argument of this point in his appellate brief in the Appendix) *Also see Chambers* v. *Maroney, Id.*

Here, the Arkansas Supreme Court erroneously deemed the city street search of the green suitcase unreasonable in light of *Chadwick*. *Chadwick* did not involve the automobile exception and there is nothing within *Chadwick* that indicates that it limits the scope of a valid automobile exception search. 433 U.S. at 11, 12, 13; *also see, United States* v. *Finnegan,* 568 F. 2d 637, 640-642 (9th Cir. 1977); *United States* v. *Gaultney,* 581 F. 2d 1137, 1144-1145 (5th Cir. 1978); *United States* v. *McGrath,* 448 F. Supp. 1338, 1341-1342 (S.D. N.Y. 1978). Petitioner submits that *Chadwick* stands for the principle that where the warrantless search of luggage cannot be justified under either the automobile exception or as a search incident to an arrest, the court will not allow the search based upon "mobility of luggage."

Here, the Arkansas Supreme Court invalidated a reasonable search under the automobile exception to the warrant requirement of the Fourth Amendment by erroneously stretching the holding of *Chadwick* and the facts of *Sanders,* and by twisting and even creating petitioner's argument on appeal.

While there is an indication that the Arkansas Supreme Court implicitly recognized the error it made below in this case through its strange *"inter-state* vs. *intra-state* state journey distinction" in *Berry* v. *State of Arkansas*, 263 Ark. 446, 565 S.W. 2d 418 (1978), the result of the case here is an incorrect decision which, if allowed to stand, emasculates the automobile exception in Arkansas.

B.

THE WARRANTLESS SEARCH OF RESPONDENT'S GREEN SUITCASE WAS REASONABLE AS MADE PURSUANT TO THE "AUTOMOBILE EXCEPTION."

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In applying this Amendment, this Court has held that the fundamental inquiry has been whether a search or seizure is reasonable under all of the circumstances. *United States* v. *Chadwick*, *supra*, 433 U.S. at 9; *Cooper* v. *California*, 386 U.S. 58, 59, 61 (1967). In making such a determination this Court has recognized that there are significant differences between automobiles and stationary property which permit the warrantless seizure and search of automobiles in circumstances

in which warrantless searches would not be reasonable in other contexts.

The "automobile exception" was first recognized in *Carroll* v. *United States*, 267 U.S. 132 (1925), wherein this Court deemed reasonable the warrantless search and seizure where there was: (1) probable cause for believing that the car was carrying contraband, and (2) exigent circumstances precluded the search and seizure, unless done without a warrant. *Id.*, 267 U.S. at 154, 156.

In *Chambers* v. *Maroney*, *supra*, the petitioner contended that the warrantless search and seizure were unconstitutional since (a) the officers did not have probable cause to arrest him, and (b) the fact that the search took place after the car and its occupants were in police custody and hence, had ample opportunity to procure a search warrant. See petitioner's brief, 26 L. Ed. 2d at 891.

After determining that probable cause had existed to seize the car and its occupants, 399 U.S. at 47-49, the Court turned its attention to the second prong of *Carroll*, probable cause, and rejected petitioner's second contention holding:

> "Neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective

search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll, supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible."

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to

search, either course is reasonable under the Fourth Amendment." 399 U.S. at 50-52.

Thus, *Chambers* made it clear that, given the two prongs of the "automobile exception", there is no constitutional qualitative difference between a search and a seizure; that is, given a valid seizure pursuant to the "automobile exception", a valid search is permissible also. See Moylan, *"The Automobile Exception: What It Is and What It Is Not — A Rationale In Search of a Clearer Label."*, 27 Mercer L. Rev. 987, 1002-1003 (1976).

Turning back to the facts of *Sanders*, it is obvious that the officers had probable cause, having received information that Sanders would be arriving at 4:35 p.m. that day on the Friday afternoon American Airlines flight from Dallas, that he would be de-planing at Gate 1 and that he would be bringing a green suitcase filled with marijuana. (T. 25-31) The fact that the informant had previously supplied information which had led to Sanders being convicted of three narcotics violations increased the credibility of the information, leading the three officers to set up surveillance at the airport.

Lest the contention be raised that the officers could have obtained a search warrant prior to their surveillance, it should be noted that, at that point, there was no corroboration of the informant, and there would have still been problems particularly describing the place to be searched. Further, there is nothing in the record to indicate the underlying circumstances from which the informant concluded that the respondent was transporting marijuana. Therefore, the affidavit upon which an applicant would have suought to obtain the search warrant would have been constitutionally defective. *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964).

Therefore, it was not until they observed respondent pick up his green suitcase at the baggage area that information received from the informant was corroborated, ripening into probable cause to believe that Sanders's suitcase contained marijuana.

At that point, however, the respondent had been joined by a confederate, and when both of them got into the taxi, placing the suitcase in the trunk, and began to drive away, exigent circumstances certainly existed. (T. 26-28, 32-34, 44, 46, 52, 53, 86, 93) At that point the officers ran for their car to follow the taxi and were moving so quickly that Officer Mize was left behind in the airport. (T. 27, 44, 53) The two officers followed respondent's taxi down one of the busiest streets in Little Rock during 5 o'clock traffic on a Friday afternoon and called for the assistance of a marked patrol car. (T. 47, 76) In light of the fact that the respondent was in the company of an accomplice and the officers knew not the respondent's destination, they were clearly within the ambit of *Chambers* and *Carroll* in stopping the cab and conducting a warrantless search. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51, also see, fn. 9 at 51; *Cooper* v. *California*, *supra*, 386 U.S. at 59; *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976).

The taxi was stopped on the busy street during rush hour and the driver was asked to open the trunk. (T. 47, 48) In the trunk the officers saw the green suitcase. It was not locked and they quickly opened it, finding over 9 pounds of marijuana. (T. 27, 35, 147) The respondent and his accomplice were then placed under arrest. (T. 34) The detention on the street was direct and brief but adequate to determine that the respondent and his accomplice should be arrested. Clearly, the search was a reasonable one pursuant to the "automobile exception" as delineated by *Chambers* and *Carroll*.

The Arkansas Supreme Court held, however, that the exigent circumstances which were present allowing the stop of the taxi became non-existent once the cab stopped. Such reasoning defies both common sense and the rule of the "automobile exception" and denotes some constitutional confusion on the court's part. The court's apparent logic was that once the officers stop or seize a vehicle, their mere presence terminates all exigencies. Were this logic valid, there would be no such thing as an "automobile exception," save when some daring officer leaps from his moving vehicle into that of the suspect's. As this Court noted in *Carroll*, a form of the "automobile exception" has been around in this country since at least 1789. 267 U.S. at 150-151. Contrary to the court's tilted logic, exigent circumstances justifying the seizure do not immediately evaporate upon the presence of law officers at the scene of the seizure. *Carroll* v. *United States*, *supra*; *Chambers* v. *Maroney*, *supra*; *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973); *Cardwell* v. *Lewis*, 417 U.S. 583, 595-596 (1974); *Texas* v. *White*, 423 U.S. 67 (1975).

Perhaps the logic of the court is that, given the valid stop or seizure of the taxi, the exigent circumstances are not existent because, since the car is a taxi rather than respondent's own vehicle, there is no danger that it would be moved out of the locality while the officers left the scene at 5 o'clock on a Friday afternoon in order to obtain a warrant. Such chauvanistic thinking would not take into account the facts that it is the suspect who was headed *somewhere* in the cab and that it is he who is paying the fare and is then alerted. Given this, the departure of the police to obtain a warrant leads to the very real possibility that the contents may never be found again. It is precisely this situation to which this Court addressed itself in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51; and noted in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 459-460.

Perhaps the logic of the court is that, having the situation apparently under control, the police should then escort everyone to the police station while they obtain a warrant. It being around 5:00 p.m. on a Friday afternoon, this would involve a minimal delay of some two hours while the parties are transported to the police station for booking and fingerprinting and the police try and locate a judge to issue the search warrant. It is precisely this situation *Chambers* addressed when it was said:

> "Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.
>
> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 51-52; *Cardwell* v. *Lewis, supra*, at 594.

THIS logic of the Court would also conflict with *Cardwell's* language stating:

> "Assuming that probable cause previously existed we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is inforeseeable and arises only at the time of the arrest. cf. *Chambers, id.*, at 50-51. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." 417 U.S. at 494-596.

Finally, given the fact that the court erroneously stated that the petitioner contended that "mobility of the object to be searched (the green suitcase) justified a warrantless search," it is possible that the court applied "search incident to arrest" doctrine to determine that there were no exigent circumstances.

Whatever the rationale for the court's decision, it is clear that the facts of this case show the search to have been reasonable under the "automobile exception." At the moment of corroboration of the informant at the airport, the officers had probable cause to believe that the suitcase contained contraband; hence, they had probable cause to search the suitcase. When the respondent and his accomplice drove away with the suitcase in the taxi, they then certainly had probable cause to believe that the taxi contained the contraband and likewise had probable cause to search it.

There is likewise no doubt as to the existence of exigent circumstances when the officers watched respondent and the accomplice place the suitcase in the trunk of the cab and drive away onto one of the busiest streets in the city in the Friday afternoon rush hour traffic to an unknown destination. The exigent circumstances made it impractical to seek a warrant. Obviously, then, the officers were justified in seizing the taxi on the street pursuant to the "automobile exception" of *Chambers* and *Maroney, supra;* and *Carroll* v. *United States, supra*. Therefore, there being no constitutional qualitative difference under the "automobile exception" between a search and seizure, *Chambers*, 399 U.S. at 51-52, the warrantless search of the vehicle was reasonable.

The question then becomes whether the search of the green suitcase found in the trunk was reasonable and the answer must be in the affirmative, because it was the fruit of the reasonable "automobile exception" search.

In *Carroll,* this Court held that the intrusion, the search and seizure of the car, was reasonable pursuant to what is now known as the "automobile exception." The Court held that the officers, armed with probable cause to believe that contraband was situated *somewhere* within the car and faced with the exigencies in complying with the Warrant requirement which were inherent in a moving vehicle, search of the car for that contraband was reasonable. Hence, given the reasonableness of the search and seizure pursuant to the "automobile exception," the fruits of that search, which were found behind the upholstery of the seats, clearly would have been admissible.

In *Chambers,* the officers had probable cause to believe that the car contained contraband and the fruit of the crime,

although they did not know *where* in the car it was located. In view of the probable cause to search, coupled with the exigent circumstances, the Court held that the search of the car and the seizure of the gun and fruit of the crime found in the compartment under the dash were reasonable pursuant to the "automobile exception;" hence, the fruit of the reasonable search was admissible.

The point of this is that in neither *Carroll* or *Chambers* did the officers know where in the automobile the objects of their searches were. Under the "automobile exception" they were allowed free rein to search the entire vehicles to find those objects, the exact substance of which they knew not prior to the search. Further, it was the existence of the exigencies inherent in moving autos, coupled with the officers' probable cause to believe that the contraband or fruit of the crime was located in the car, that made reasonable the warrantless search and admissible the fruit of the search.

Here, the officers had probable cause to believe that the green suitcase contained contraband. They also knew that the suitcase was in the trunk of the taxi as it drove away from the airport. Like *Carroll* and *Chambers,* the officers had probable cause to believe that the car contained contraband. Further, since they had seen the suitcase being placed in the trunk and therefore knew the exact location of the contraband within the vehicle it could be said that even greater probable cause existed in the instant case than in *Carroll* and *Chambers*. Thus, this probable cause coupled with the exigencies here (the moving auto; the 5:00 p.m. Friday rush hour traffic on one of the busiest streets in the city; the fact that it was highly probable that it would take longer than normal to have a search warrant issued since the courts had all closed for the weekend; the fact that the

respondent had been joined by a confederate), combined to justify the seizure of the taxi and the searching of it pursuant to the automobile exception to the Fourth Amendment.

Given the reasonableness of a warrantless search pursuant to the automobile exception, we know of no case which limits extent of the area of the vehicle or the fruit of that search. Indeed, the warrantless search of trunks or luggage found within the trunk of a car during a search pursuant to the automobile exception to the Fourth Amendment has long been deemed a reasonable one. *United States* v. *Finnegan, supra,* 568 F. 2d at 640-641; *United States* v. *Gaultney, supra,* 581 F. 2d at 1144-1145; *United States* v. *Ficklin and Seefeldt,* unreported below, Nos. 77-2923 and 77-3220, (9th Cir., filed February 10, 1978), cert. denied, 47 U.S.L.W. 3222 (No. 77-1635; October 2, 1978); *Swonger* v. *United States,* unreported below, No. 76-2555 (6th Cir. 1977), summary at 46 U.S.L.W. 3225, cert. denied, 46 U.S.L.W. 3470 (No. 77-314; January 24, 1978); *United States* v. *Soriano,* 497 F. 2d 147 (5th Cir. 1974) (en banc), reaffirmed without opinion sub nom.; *United States* v. *Aviles,* 535 F. 2d 658 (5th Cir. 1976), cert. denied, 433 U.S. 911, 53 L. Ed. 2d 1095; *United States* v. *Tramunti,* 513 F. 2d 1087 (2d Cir. 1975), cert. denied, 423 U.S. 832; *United States* v. *Canada,* 527 F. 2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867; *United States* v. *Issod,* 508 F. 2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916; *United States* v. *McGarrity,* 559 F. 2d 1386, 1387-1388 (5th Cir. 1977); *United States* v. *Giles,* 536 F. 2d 136, 140 (6th Cir. 1976); *People* v. *Kreichman,* 37 N.Y. 2d 693, 376 N.Y.S. 2d 497, 339 N.E. 2d 182 (1975); *People* v. *Lemmons,* 40 N.Y. 2d 505, 387 N.Y.S. 2d 97, 354 N.E. 2d 836 (1976); *Wimberly* v. *Superior Court,* 45 Cal. App. 2d 486, 119 Cal. Rptr. 514, 519-521 (1975), *vacated on other grounds,* 128 Cal. Rptr. 641, 547 p. 2d 417 (1976).

In sum, the search here was clearly reasonable as having been made pursuant to the automobile exception to the Warrant Clause of the Fourth Amendment.

C.

UNITED STATES V. *CHADWICK*, 433 U.S. 1 (1977), IS INAPPLICABLE TO THIS CASE AND DOES NOT RESTRICT A REASONABLE WARRANTLESS SEARCH MADE PURSUANT TO THE AUTOMOBILE EXCEPTION TO THE WARRANT CLAUSE OF THE FOURTH AMENDMENT.

United States v. *Chadwick, supra,* is inapplicable to this case. The issue before the Court in *Chadwick* was "whether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owners, when there is probable cause to believe the footlocker contains contraband." 433 U.S. at 3.

As is obvious from the issue presented, *Chadwick* does not deal with a reasonable search made pursuant to the automobile exception of the Warrant Clause of the Fourth Amendment. The only involvement that *Chadwick* had with an automobile was the fact that the footlocker was seized as it was placed into the open trunk of a parked car before its engine had been started. 433 U.S. at 4.

This being the factual connection of the footlocker's momentary contact with the automobile and noting the status of the car at the time of seizure, it is patent that the second prong of the automobile exception, exigent circumstances

prohibiting the obtaining of a warrant, could not have been satisfied. *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 459-462. Apparently the government realized that the facts here w uld not place the case at all within the automobile exception, and after the district court dismissed this contention by noting the mere coincidental relationship between the car and footlocker, the government never raised the contention again. 433 U.S. at 5, 11, 12.

Upon seizing the 200 pound, double-locked footlocker and arresting the petitioners, the government transported the locker and arrestees to the federal building where the locker remained under the exclusive control of the government for an hour and a half. At that point, the agents conducted a warrantless search of the lecker which yielded marijuana. 433 U.S. at 5.

Having quickly abandoned its theory that the search was reasonable under the automobile exception, the government proceeded upon two theories: (1) that the Court should create a new exception to the Warrant requirement of the Fourth Amendment holding that movable personalty lawfully seized in a public place should be subject to a search without warrant if probable cause exists to believe it contains evidence of a crime; (2) that the Constitution permits the warrantless search of any property in the possession of one arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime. 433 U.S. at 14. In proffering its first theory, the government asked the Court to analogize the rationale of automobile searches to permit warrantless searches of luggage. In advancing the second argument, the government contended that the Warrant requirement of the Fourth Amendment protects only interests traditionally identified with the home. *Id.* The Court dismissed this argument, discussing at

some length the history of the Fourth Amendment and the narrow exceptions to the Warrant requirement. 433 U.S. at 6-11.

Turning to the government's two theories, the Court rejected the former on the grounds that there are significant differences between motor vehicles and other property which justify the different treatment, such as a vehicle's inherent mobility making obtaining a warrant impracticable and the diminished expectation of privacy surrounding automobiles. 433 at 12-13. The Court then noted that these special distinctions did not apply to luggage, which was primarily intended as a repository of personal effects. 433 U.S. at 13.

The Court, therefore, refused to create a new exception to the Warrant requirement for mobile personalty or luggage which would have been based on the same rationale as the automobile exception. In refusing to do so, it noted that there were no exigent circumstances present here justifying the warrantless search of the 200 pound, double-locked footlocker at the federal building, one and one-half hours after the agents had reduced it to their exclusive control. 433 U.S. at 13.

The Court rejected the government's second theory, stating that the agent's search here could not be justified as a search incident to the arrest under *Chimel, supra; Terry* v. *Ohio,* 392 U.S. 1 (1968); or *United States* v. *Robinson,* 414 U.S. 281 (1973), because of *Preston* v *United States,* 386 U.S. 364, 367 (1964), and the Court concluded:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrester might gain

access to the property to seize a weapon or destroy evidence, a search of that property is no longer an *incident of the arrest*. 433 U.S. at 15. (emphasis supplied).

It should be noted that the Court rejected the government's theories attempting to create new classes of exceptions to the Warrant requirement, and it did *not* say that luggage could not be searched without a warrant where the search was reasonable pursuant to a recognized exception to the Warrant requirement. Indeed, this Court recognized that there may be situations in which a warrantless search of luggage is reasonable when exigent circumstances exist. 433 U.S. at 11. One of the two elements of the automobile exception which makes the warrantless search reasonable is the existence of exigent circumstances, which preclude obtaining a warrant. *Carroll* v. *United States*, *supra*, 267 U.S. at 153; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 459-462.

United States v. *Chadwick*, *supra*, did not involve a fact situation within the ambit of the automobile exception; nor did *Chadwick* proscribe the search of luggage done within the ambit of the automobile exception, which is the situation in the case at hand. In *Chadwick*, the connection between the 200 pound, double-locked footlocker and the car was coincidental. The footlocker had just been placed in the trunk at the moment of apprehension. The trunk was still open, the car was parked and the engine was not running. Here, the unlocked suitcase was in the closed trunk of an automobile, which was moving along a busy city street at rush hour on a Friday afternoon. The relationship here between the taxi and the suitcase could hardly be termed "coincidental".

To extend the language and doctrine of this Court which it employed to dismiss attempts to extend the automobile exception to personalty and to extend the time frame for search incident to arrest, to proscribe a reasonable search conducted pursuant to the automobile exception of the Fourth Amendment is error. As the Ninth Circuit stated in *United States* v. *Finnegan*, *supra*, and noted in *Berry* v. *State of Arkansas*, *supra*, 565 S.W. 2d at 420:

> "Were we to rule that *Chadwick* applies here and renders the search of the suitcase illegal, inconsistent and contradictory results would follow. For instance, a police officer could search and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car." 468 F. 2d at 641.

Clearly, *Chadwick* has its realm of applicability, but within the realm of a reasonable search pursuant to the automobile exception is not it.

CONCLUSION

The Writ of Certiorari should be granted, and the decision of the Arkansas Supreme Court should be reversed and the verdict of the trial court reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1497

STATE OF ARKANSAS, *Petitioner,*

v.

LONNIE JAMES SANDERS, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I. OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 262 Ark. 595, 559, S.W.2d 704 (1977) and is attached in the Appendix prepared by Petitioner.

II. JURISDICTION

The respondent concurs with the petitioner's jurisdictional statement.

III. QUESTIONS PRESENTED

The Arkansas Supreme Court correctly held that respondent's expectation of privacy in the contents of his luggage in the trunk of the cab should have required the procurement of a search warrant prior to the search.

IV. CONSTITUTIONAL PROVISION INVOLVED

The respondent concurs with the petitioner that the Fourth Amendment to the Constitution of the United States is the appropriate constitutional section at issue herein.

V. STATEMENT OF THE CASE

The respondent concurs with the statement of the case presented by the petitioner with the following exception. In the petitioner's Statement of the Case, petitioner indicates that Sanders and Rambo were not placed under arrest until the suitcase was searched. Detective Isom's testimony indicates the Mr. Rambo and Mr. Sanders were arrested at the time the cab was stopped. (T.28)

ARGUMENT

The Arkansas Supreme Court Correctly Held That Respondent's Expectation Of Privacy In The Contents Of His Luggage In The Trunk Of The Cab Should Have Required The Procurement Of A Search Warrant Prior To The Search.

Should the car search exception to the warrant requirement extend to the seized closed personal luggage of an arrestee found in the trunk of a cab or should the arrestee's expectation of privacy in the contents of his suitcase require the procurement of a search warrant? The issue before the Court is a predictable and inevitable confrontation between the car search exception to the warrant requirement announced in *Carroll* v. *United States* 267, U.S. 132 (1925) and the holding in *United States* v. *Chadwick,* 433 U.S. 1 (1977) requiring the issuance of a search warrant before police entry into a footlocker held in police custody.

Initially it should be remembered that *Carroll, supra,* announced an exception to the warrant requirement based on practicalities arising from the mobility of the automobile and the fleeting opportunity to search. Therefore, an immediate roadside search of the vehicle of an arrestee is justified where probable cause exists. However, *Carroll, supra,* was and remains an exception to the warrant requirement.

In *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) a case in which the Court evaluated a warrantless pro-

bable cause search of an automobile, the Court noted that "the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears". In reviewing the warrant requirement in *Coolidge, supra,* at 455-456 the Court stated:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by Judge or Magistrate are *per se,* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions.' *Katz* v. *United States,* 389 U.S. 347, 357. The exceptions are 'jealously and carefully drawn', *Jones* v. *United States* 357 U.S. 493, 499, and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' *MacDonald* v. *United States* 335 U.S. 451, 456. 'The burden is on those seeking the exemption to show the need for it.' *United States* v. *Jeffers,* 342 U.S. 98, 51. In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or extravagant to some. But the values were those of the authors of our fundament constitutional concepts. In times not altogether unlike our own they won by legal constitutional means in England and by revolution in this continent - a right of personal security against arbitrary intrusion by official power. If times have changed reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made these values served by the Fourth Amendment more, not less important."

The Court's recognition of the continuing vitality of the majority's analysis in *Coolidge, supra,* appears in the language of *Mincey* v. *Arizona,* 98 S. Ct. 2408 at 2414 (1978), a case in which the Court rejected a "murder scene exception" to the warrant requirement.

> "Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the law. For this reason warrants are geneally required to search a person's house or his person unless 'the excigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

It must, however, be noted that the United States Supreme Court has upheld warrantless automobile searches based upon pragmatic reasons where the chances of removal of the vehicle or destruction of evidence were remote. In *Chambers* v. *Maroney,* 399 U.S. 42 (1970), the Court held that a police officer with probable cause to search an automobile at the scene where it is stopped may later do so at the station house without first obtaining a warrant. There was a justification for the delayed search in *Chambers,*

supra, in that the occupants in the car were arrested in a dark parking lot in the middle of the night and a careful search at that point was impractical and perhaps unsafe for the officers. *Chambers, supra*, at 52 n. 6. Nothing in *Chambers, supra*, suggests that the officers could search a suitcase clearly utilized as a repository of personal effects without first procuring a warrant.

In *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) the Court refused to suppress evidence seized during the course of a standard warrantless inventory search of the defendant's automobile after it had been lawfully impounded. That search which was characterized as common police practice throughout the country was justified on the grounds that the inventory (1) protects the owners property while in police custody, (2) protects the police against claims or disputes over stolen property and, (3) protects the police from potential danger. *Opperman, supra*, at 370. In *Cady* v. *Dombrowski*, 413 U.S. 433, (1973) the Court approved a warrantless search of the defendant's automobile taken to a garage although no probable cause existed to believe that the vehicle contained contraband or evidence of a crime. The search was upheld since it followed standard police procedure incident to the caretaking function of the local police to protect community safety. In *Cady, supra*, the local police reasonably presumed that a revolver would be found in the vehicle in that they believed that the owner, a

Chicago police officer, was required to carry his weapon at all times.

Although warrantless searches absent exigencies were permitted in *Opperman, supra*, and in *Cady, supra*, those cases do not suggest that the police in conducting such searches are authorized to inspect suitcases or luggage which could be removed and stored without further intrusion. See, *Opperman, supra*, dissenting opinion at 388 n. 6.

Since the decision in *Chadwick, supra*, several cases have arisen in the United States Circuit Courts of Appeal presenting similar issues to those raised herein.

In *United States* v. *Schleis*, 582 F.2nd. 1166 (8th Cir. 1978) the Eighth Circuit reconsidered the warrantless search of a briefcase seized from the defendant at time of arrest. The briefcase was searched after the defendant had been placed in a cell. The case has been remanded for further reconsideration in light of *Chadwick, supra. Schleis* v. *United States*, 433 U.S. 905 (1977). The Eighth Circuit concluded that there was no reason to believe that any evidence might be destroyed or that the briefcase contained explosives or other dangerous instrumentalities and, therefore, the warrantless search of the briefcase violated the Fourth Amendment. The Court found that by placing his personal effects inside a combination locked briefcase, Schleis clearly, in the language of Chadwick, 'manifested an expectation that the contents would remain free from police examination.' *Schleis, supra*,

at 1170. The Court also noted that the seizure of the briefcase at the time of the arrest was sufficient to place the property within the officer's exclusive control, therefore, triggering the warrant requirement. *Schleis, supra*, at 1172.

Then in *United States* v. *Stevie* and *United States* v. *Reynolds*, 582 F.2nd 1175 (8th Cir. 1978) the same Court applied the warrant requirement to luggage seized in a probable cause search of an automobile and found in the trunk. There, DEA officers went to the St. Paul Airport and watched the defendants as they rented a car, placed their bags in the trunk and drove away. After pulling the defendants over, the officers detected the odor of marijuana inside the auto. The defendants were removed from the car and placed under arrest. The officers then seized the suitcase placed on the rear floor of the stationwagon. Since the suitcase seized by the officers was clearly within their exclusive control, the Court held that the defendants' expectations of privacy to the contents of the luggage required the procurement of a warrant.

A contra position was taken by the Ninth Circuit in *United States* v. *Finnigan*, 568 F.2nd 637 (9th Cir. 1977) where the *Carroll* exception was held paramount and justified the search of a suitcase found in an automobile where probable cause existed to search the car. The Ninth Circuit found that, "A close reading of *Chadwick* shows that that case was concerned with the creation of a whole new class of objects to be excepted for the general proscription against warrantless searches rather than with the scope of the automobile search exception." *Finnigan, supra*, at 640.

The Fifth Circuit has dispensed with the warrant requirement in post-Chadwick auto luggage search cases if the exigencies of the situation justify proceeding without a warrant. In *United States* v. *Fontecha*, 576 F.2nd 601 (5th Cir. 1978), a border agent stopped defendant's car four miles from his check point on a deserted road. After detecting the odor of marijuana he searched defendant's luggage. The Ninth Circuit found that the transportation of luggage in an automobile does not *per se* constitute exigent circumstances justifying a warrantless intrusion. But the factors surrounding Fontecha's arrest and the probable cause search on a deserted road justified the procedure on that occasion.

The events surrounding the search in the instant case are as follows. David Isom, a detective for the Little Rock Police Department received information from a reliable informant that Lonnie Sanders would be arriving at the Little Rock Airport with a green suitcase full of marijuana. (T.26) Acting on that information Detective Isom proceeded to the airport with Officers Mize and Tuck. (T.27) Mr. Sanders deplaned and was observed immediately by Detective Isom. (T.27) Sanders was then followed through the terminal where he met Mr. Rambo. Sanders picked up a green suitcase and gave it to Rambo. (T.28) Sanders then left and entered a taxi cab. Rambo waited until

the crowd dispersed and then went to the taxi. Rambo placed the suitcase in the trunk of the cab. (T.28) The cab left the airport and Isom and Tuck radioed ahead to a black and white which pulled the cab over. (T.49) Isom and Tuck arrived, arrested Sanders and Rambo, seized the green suitcase from the trunk of the cab, opened the suitcase and discovered ten pounds of marijuana. (T.28) Mr. Sanders, Mr. Rambo and the suitcase were taken to the station house. The cab driver and the cab were released.

The Fourth Amendment "protects people not places" and safeguards their legitimate expectations of privacy against unreasonable government intrusion. *Katz* v. *United States*, 389 U.S. 347 (1967). Therefore, in entering the Fourth Amendment analysis in the instant case one should focus primary attention not on the objects involved, a cab and a suitcase, but on the privacy interest of the passenger. "Insofar as the Fourth Amendment protects and extends to motor vehicles, it is the right to privacy that is the touch stone of our inquiry." *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974).

The Court has once announced that a lesser expectation of privacy attaches to the automobile than to a citizen's home. "It's function is transportation and it seldom serves as one's residence or as the repository of personal effects" and "its occupants and its contents are in plain view." *Cardwell, supra*, at 590. However, that language in *Cardwell, supra*, was unnecessarily broad and not entirely accurate. Cardwell

dealt with a warrantless probable cause seizure of paint scrapings from the exterior of an automobile. It is of course correct that the automobile exterior and portions of the interior which are readily visible through the glass and doors exhibit little if any expectation of privacy. It is also correct that police stop and examine vehicles on a daily basis to check the license plates, inspection stickers, and equipment. See, *Cady, supra*, at 441 and *Opperman, supra*, at 368. However, it is not the automobile which is at issue herein, it is the expectation of privacy to the contents of the suitcase, a repository of personal effects often carried in an automobile. That distinction was recognized in *Chadwick, supra*, "Unlike an automobile whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." It cannot logically follow that the expectation of privacy is diminished by placing luggage in the trunk of a car. If anything, a greater expectation of privacy is demonstrated by taking the closed luggage and placing it in an enclosure locked for protection.

Given the existence of a reasonable expectation of privacy in the contents of a suitcase, what justification does the State present for the warrantless intrusion?

The burden rests upon the State to prove ". . . the exigencies of the situation made that course imperative." *MacDonald, supra*. The State vigorously

argues that the warrantless seizure of the cab was justified by the exigencies of the moment. Petitioner then reasons that it necessarily follows that the warrantless search of the suitcase was reasonable as the "fruit" of the acceptable seizure of the automobile. (Petitioner's brief at 24). That conclusion is reached without a demonstration that an immediate warrantless search of the suitcase was necessary. The suitcase was removed from the trunk of the cab and was clearly in the possession of the officers. Sanders and Rambo were in custody and obviously under the control of the three Little Rock Police Officers. There is no contention that the suitcase was within the "wingspread" of the defendants such that they might reach the suitcase to obtain a weapon or destroy evidence. Therefore, the search incident to arrest exception to the warrant requirement that is reviewed in *Chimil* v. *California*, 395 U.S 752 (1971) is not at issue. There simply were no exigent circumstances requiring an immediate search of the suitcase. Petitioner does not and cannot contend otherwise. Further, there was no reason to believe that the suitcase contained any inherently dangerous instrumentality.

It should be noted before proceeding further that respondent does not contend that automobile compartments such as locked trunks, glove boxes, and consoles cannot be searched without a warrant. Obviously these areas exhibit an expectation of privacy but they are part of the automobile and incapable of independent police seizure. If the car leaves, the glove

box leaves and the mobility rational of *Carroll, supra*, may well justify warrantless inspection with probable cause of the enclosures. The Court need not reach that issue herein, the distinction between the glove box and the suitcase is apparent.

The State also attempts to justify the warrantless search in that the weekend was approaching and it would have been difficult to find a magistrate. That seems to be little or no excuse since the suitcase could have been seized and held until the magistrate was found. Further, Sanders and Rambo could have been arrested and charged at that point. The same probable cause for the search would have constituted reasonable casue for their arrest. See, *Ark. Rules Crim. Pro.* Rule 4.1.

Amicus, Americans for Effective Law Enforcements, Inc. extend the argument of the state and make a rather paternalistic assertion that it is best for the citizen if we allow luggage searches at the scene of the arrest thereby avoiding a great deal of inconvenience if no contraband or other evidence of a crime is discovered. It is neither Amicus nor the Court's place to decide whether procurement of a warrant would "inconvenience" the passengers or driver of the vehicles. It should be remembered that the citizen can consent to an immediate search. The decision as to whether the citizen will be "inconvenienced" should be left with the citizen.

Further, Americans for Effective Law Enforcements, Inc., argues that officers have an absolute need to conduct a contemporaneous search of luggage. Amicus argues that a failure to extend the car search exception to suitcases found in an automobile will hamper law enforcement. Brief of Americans for Effective Law Enforcement, Inc., as Amicus Curaie at 8. That argument has been often heard. As the Court pointed out in *Chadwick, supra,* the warrant provides for the "detached scrutiny of a neutral magistrate which is a more reliable safeguard than the hurried judgment of law enforcement officers engaged in the often competitive enterprise of feretting out crime". *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948). Further, as the Court reminded us in *Mincey, supra,* fundamental constitutional rights will not be compromised for the sake of simplifying law enforcement.

It should be noted that the dissent in *Chadwick, supra,* takes the position that the proper seizure of the luggage may by itself render the subsequent warrantless search constitutionally permissible. Further, the dissent there argues that warrants are usually forthcoming in these situations and the formality of procuring a warrant would not have "much practical effect" in protecting Fourth Amendment values.

The seizure of the suitcase obviously interferes with an individual's possessary property rights. But the property rights are not the crux of the Fourth Amendment. It is rather the individual's privacy rights. The majority points out in *Chadwick, supra,* that the principal privacy interest is not in the container itself but its contents. The search of the contents of the footlocker in *Chadwick* were there characterized as "... a far greater intrusion into Fourth Amendment values than the impoundment of the foot locker".

It may well be that warrants are usually forthcoming in these cases and the formality of warrant procurement would not have much practical effect. However, it has not been this attorney's experience that warrants would have been readily issued upon the reasons announced by Officers in numerous car search incidents. However, even if warrants would be generally forthcoming in these cases, the argument of the dissent in *Chadwick* is an argument of pragmatics and does not directly deal with the Fourth Amendment maxim that any warrantless search must be justified as "imperative" or "compelling".

In summary, the car search exception to the warrant requirement should not be extended to suitcases or other similar containers which by their nature indicate to the police officers that they are a repository of personal effects and that the owner does not expect the contents to be probed without his permission or without a warrant. Suitcases can be easily and readily seized by law enforcement officers and secured at the station house until a warrant is procured. The basis for the *Carroll, supra,* exception to the warrant requirements is inapplicable to luggage. An automobile is mobile and the chance for search fleeting, the suitcase is powerless to transport itself and the opportuni-

ty to search lasts as long as the police desire to keep the item in their possession. To extend *Carroll, supra,* to justify the search of the suitcase in the instant case would extend the exception past the rational which gave it birth. The Court should continue to recognize that the expectation of privacy is the key to the warrant requirement in Fourth Amendment analysis and hold that consideration paramount unless overcome by a compelling demonstration of exigencies by the State. As was stated by the dissent in *Chadwick, supra,* "Criminal law necessarily involves some line drawing." It does, and the line drawn for extension of the Carroll doctrine should be here. The state has not justified the warrantless search and the decision of the Arkansas Supreme Court suppressing the evidence found in the suitcase should be affirmed.

CONCLUSION

For the reasons stated above the decision of the Arkansas Supreme Court at 262 Ark. 595, 559 S.W.2d 704 (1977) should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

State of Arkansas ..... *Petitioner*

Vs.

Lonnie Jasmon Bolden ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

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CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

State of Arkansas ..... *Petitioner*

Vs.

Lonnie James Sanders ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

ARGUMENT

The respondent's brief is filled with the broken field logic which might be expected from one occupying his fact position. The respondent, faced with the task of placing a round peg in a square hole, has attempted to do just that, via his attempt to remove this case from the ambit of the automobile exception to the Fourth Amendment and place it within the confines of *Chadwick* v. *United States,* 433 U.S. 1 (1977). When confronted with the holdings of *Carroll* v. *United States,* 267 U.S. 132 (1925); *Chambers* v. *Maroney,* 399 U.S. 42 (1970), and others, he leaps to another topic or attempts to dismiss them by misstatements of their rationale and holdings.

The initial error bearing discussion is the respondent's erroneous dismissal of *Chambers* v. *Maroney, supra.* In so doing, the respondent notes that:

a justification for the delayed search in *Chambers*, supra, in that the occupants in the car were arrested in a dark parking lot in the middle of the night and a careful search at that point was impractical perhaps unsafe for the officers. *Chambers*, supra, at 52., n.6. Nothing in *Chambers*, supra, suggests that the officers could search a suitcase clearly utilized as a repository of personal effects without first procuring a warrant." Respondent's brief, PP. 5-6.

The last sentence quoted above will be dealt with fully in subsequent paragraphs. The petitioner calls the Court's attention to the fact that this quote is an example of the respondent's broken field logic used to ignore the Court's holdings which are contrary to his position.

The respondent here has merely explained some of the practicalities for allowing the officers to search the car at the police station, rather than at the scene and has failed to note the full impact and the rationale: that the officers in *Chambers* had probable cause to search, coupled with the exigent circumstances inherent in the fact that there was an automobile involved containing the probable felons and the fruit of the crime. The facts being as they were, the Court found no constitutional difference between seizing the car and occupants and holding them until a magistrate could rule on probable cause and issue a warrant, and carrying out an immediate warrantless search. *Chambers* v. *Maroney*, supra, 399 U.S. at 50-52.

The fact is simply that, contrary to the respondent's treatment of it, *Chambers* is applicable to the facts of the case at bar. Here, as in *Chambers*, the officers had probable cause to believe that the taxi contained the probable felons and a suitcase full of contraband. There were likewise present exigent circumstances

in that they were contained in a taxi speeding away from the airport to an unknown destination during 5:00 P.M. rush hour traffic on a Friday afternoon when stopped.

The respondent next attempts to buttress his position by reliance upon the Eighth Circuit's holding in *United States* v. *Schleis*, 582 F. 2d 116 (8th Cir. 1978). The petitioner will not here attempt to reiterate the distinction between the present case and *Chadwick* which it drew in its original brief. Suffice it to say that *Chadwick* stands on its own footing and has its own realm, into which the present case does not fall. The petitioner makes this statement by way of showing that *Schleis* falls squarely within the facts of *Chadwick* (See 582 F. 2d at 1168-1169). Indeed, the petitioner points out that this Court obviously agrees, having remanded *Schleis* for further consideration in light of *Chadwick*. 403 U.S. 905; also, 582 F. 2d at 1167.

The petitioner thoroughly distinguished the doctrine of "search incident to an arrest" from that of the automobile exception in its original brief. Save it to say the petitioner fails to see the correlation between the search of a defendant's locked briefcase at the station, after he had been placed in a cell, as in *Schleis*, not remotely dealing with the automobile exception, and the search in the case at hand.

The respondent also relies upon *United States* v. *Stevie*, 582 F. 2d 1175 (8th Cir. (1978). The fact situation in *Stevie* was almost identical to the one here in that the defendants had been apprehended by DEA officers after they had left the St. Paul airport. It should be noted here that the opinion relied upon by the respondent was rendered on rehearing. The *Stevie* panel had originally upheld the constitutionality of the search and seizure in an opinion by Judge Webster which distinguished *Chadwick*.

United States v. *Stevie,* 578 F. 2d 204 (8th Cir. 1977).

The opinion on rehearing upon which the respondent relies is erroneous and it is obvious that the court fell into the same misconstrued interpretation of *Chadwick* as did the Arkansas Supreme Court in its opinion below here. Indeed, this can be easily seen by the fact that, in making its decision, the court relied in part on the *Sanders* decision. 582 F. 2d 1179, n. 5.

The petitioner feels that the distinction between *Chadwick* and the facts of *Stevie* and the case at hand were correctly noted by Chief Judge Gibson in his dissent:

> "After carefully considering Judge Heaney's opinion and reconsidering the panel opinion in this case, published at 578 F. 2d 204, I would affirm the convictions. As determined by the panel opinion, the search of the suitcase should be upheld as within the automobile exception to the warrant requirement. *United States* v. *Finnegan,* 568 F. 2d 637, 641-42 (9th Cir. 1977).
>
> I have little to add to the panel opinion but will correct the apparent misapprehension of the majority as to the distinction the panel drew between *Chadwick* and the present case. The majority view *Chadwick* as involving seizure of a footlocker *outside* an automobile. Actually, in both cases the luggage was inside an automobile when seized. However, in *Chadwick,* the Government conceded that no automobile search was involved because the seizure occurred immediately after the footlocker was placed in the automobile's trunk and before the trunk had been closed or the engine started. This fleeting contact was not sufficient to bring the automobile search exception into play.

> By contrast, the seizure in this case occurred on a four-lane express highway. The suitcases had been transported a considerable distance in the automobile by the defendants. The search was conducted immediately after the automobile was stopped. Thus the present case is distinguishable from *Chadwick* by the significant contact the suitcases had with the automobile.*United States* v. *Chadwick,* 433 U.S. at 22-24, 97 S. Ct. 2476 (Blackmun, J., dissenting). The reasons justifying warrantless automobile searches apply, in my opinion, to searches of containers found inside the automobile. See cases cited in *United States* v. *Chadwick,* 433 U.S. at 23 n.4, 97 S. Ct. 2476 (Blackmun, J., dissenting).
>
> There is one other element of the majority's decision that disturbs me. The majority opinion in this case and in *United States* v. *Schlies,* 582 F. 2d 1166 (8th Cir. to be filed concurrently), seem carefully crafted to suggest that warrants will now be required for a search of most personal property that had been reduced to the exclusive control of law enforcement officers. The dictum in the panel opinion in *United States* v. *Haley,* 581 F. 2d 723 (8th Cir. 1978) carries this suggestion one step further. It correctly upholds the warrantless opening of a zippered leather container found in plain view in a car, but only because of the exigent circumstances of an apparently injured man needing assistance. To assume that the expectation of privacy in a zippered bag approaches the expectation of privacy in a locked footlocker is carrying the analogy beyond its reasonable limits. The entire opinion in *Chadwick* is premised on the obvious expectation of privacy enjoyed by a person who doublelocks a footlocker.

As properly noted in *Chadwick*, the warrant clause of the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy", but how much "legitimate" expectation of privacy should a person be permitted to enjoy in the concealment and transportation of contraband? If *Chadwick* is viewed as applying to all closed pieces of luggage and containers that are subject to personal modes of transportation, then the enforcement of the criminal laws will be severely diminished by the inability of the law enforcement officers to discover and apprehend those who are in the pursuit of lawless activities. The additional time, energy and cost in attempting to locate a magistrate and secure a warrant cannot help but impair and diminish the effective operation of law enforcement officers. This is not to say that the Fourth Amendment is not a prized personal constitutional right enjoyed by free people, but the Fourth Amendment proscription is "against unreasonable searches and seizures." In this situation I do not think that the defendant had, should have had, or could have had any "legitimate" expectation of privacy in the concealment of marijuana in a closed piece of luggage being transported on a public highway of this country. I view this search as reasonable. . . . ."

582 F. 2d at 1180-1181.

The respondent next states that the Fourth Amendment protects people not places and asks that the Court focus its attention on the privacy interest of the passenger and not on the moving taxi or the suitcase. He goes on further to state that the Court's language dealing with the lesser expectation of privacy in an auto, found in *Cardwell* v. *Lewis*, 417 U.S. 583, 589-590 (1974), holding that there is a lesser expectation of privacy in an

automobile because the automobile seldom serves as the repository of personal effects, is "unnecessarily broad and not entirely accurate." Respondent's brief, p. 10.

The petitioner agrees that the Fourth Amendment protects people, not places. The petitioner hastens to add, however, that in *Cardwell*, supra; *Cady* v. *Dumbroski*, 413 U.S. 433 (1973); *Chambers*, supra; and *Carroll*, supra, the Court has noted that there is a lesser expectation of privacy which attaches to automobile passengers.

This is most implicit in the holdings above, for it is not the lifeless *automobile* itself which has the lesser expectation of privacy; but rather, those who use and operate automobiles upon the public thoroughfares. Indeed, this is one of the foundations of the automobile exception noted in *Cardwell*, supra; *Chambers*, supra; and *Carroll*, supra.

The respondent is somewhere in between talking out of both sides of his mouth, and wanting to have his cake and eat it too. He first argues that the Fourth Amendment protects people not places. Then, while begrudgingly admitting the diminished expectation of privacy of automobile passengers, he nevertheless asks the Court to disregard this concept because of a thing or place, i.e., luggage, inside the automobile. In other words, the respondent appears to be contending that the same degree of privacy which would attach to a suitcase which is found in one's home, attaches to that suitcase when it is found in a car. However, the Fourth Amendment right of privacy is not lodged in lifeless objects, to-wit: the automobile itself, or luggage found therein; rather, this right inures to the *persons* who operate vehicles and who place luggage therein. As noted above, it is not the automobile which has the lesser expectation of privacy, but

rather, those who operate them. Thus, the respondent's logic convolutes his own "people vs. places" argument.

It thus stands to reason that a person carrying contraband in a container within a common carrier on the public highway has a somewhat more diminished expectation of privacy than would one having such container within the confines of his own home.

In this regard, remembering that the Fourth Amendment protects people not places, the petitioner cannot help but wonder whether the person carrying contraband in an unlocked container within a common carrier on a public street has a greater expectation of privacy than *Carroll* did in carrying contraband hidden *inside the seats* of his private automobile? Likewise, does he have a greater expectation of privacy than did *Chambers* carrying contraband in a concealed compartment under the dashboard of his private automobile?

Going further and in regard to the last sentence of the top paragraph of respondent's brief on p. 6, the petitioner knows of no cases, save the one at bar and the rehearing opinion in *Stevie*, supra, which have prohibited those conducting a legitimate automobile-exception search from searching containers found in the car. Indeed, as noted by both the Ninth Circuit in *United States* v. *Finnegan*, 568 F. 2d 637, 641 (9th Cir. 1971), and the Dissent of Chief Judge Gibson in *Stevie*, supra, 582 F. 2d at 11801181, to so rule would be illogical and would lead to inconsistent and contradictory results.

Another related point which bears discussion is, assuming that the respondent's contention regarding a " luggage exception"to the automobile exception is adopted, what then con-

stitutes "luggage"? Would luggage be limited to "American Tourister"? Would it be extended to cover briefcases? Would it extend to sacks or paper bags in which a person *might* keep "personal effects"? If not, could the poor then raise an Equal Protection claim if they did not have the money to afford "formal luggage"? How would an officer, in the process of conducting an otherwise reasonable search under the automobile exception, know what constituted "luggage" and what did not?

To follow where the respondent seeks to lead the Court surely would lead to either the "inconsistent and contradictory results" which *Finnegan* supra, spoke of; or, it would totally emasculate the reasonable and necessary automobile exception to the warrant requirement of the Fourth Amendment. Neither of these results should follow, nor should the respondent's logic be followed.

The respondent next attempts an implicit dismissal of the automobile exception by the ludicrous contention that once he was stopped by the officers the exigent circumstances ceased to exist and that the officers should have taken the whole kit and kaboodle to the police station. In so doing, the respondent again attempts to draw the "search-incident" doctrine under *Chimel* v. *California*, 395 U.S. 752 (1971).

First, it should be restated, as on page 21 of the petitioner's original brief, that the exigent circumstances do not melt away like snowflakes in the Bahamas simply because the officers have stopped the defendant. This is obvious from the facts surrounding the constitutional search in *Carroll*, supra. It is even more apparent in light of the fact that the *Chambers* search was not done at the scene, but rather, at the police station. *Chambers* v. *Maroney*, 399 U.S. at 44. If the respondent's logic were followed,

the only way such a search would ever be accomplished would be when a daring officer made a "John Wayne" leap from his moving vehicle into the moving automobile of the defendant and conducted the search while fighting with a felon.

At this point, the petitioner would reiterate its contention in its original brief that exigent circumstances did indeed exist in the instant case. Without rehashing the factual circumstances of the case, which are set forth in detail in the original brief, the petitioner notes that while the ultimate decision of whether exigent circumstances were present as a matter of law in any given case is one to be determined after the fact by the trial court, the initial determination thereof must necessarily be made by the law enforcement officer present at the time of the incident. The making of this determination is similar to the determination of probable cause, which, as noted in *Draper* v. *United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) and *Brinegar* v. *United States,* 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949), must be based upon the factual and practical considera tion of a prudent police officer at the time of the arrest — not from the vantage point of a legal technician. A moving automobile on a busy public thoroughfare was involved herein; it has long been recognized that exigent circumstances are inherent in moving vehicles once they are stopped. As noted in *Carroll,* this doctrine has been in existence since at least 1789. 267U.S. at 150, 151.

Moreover, it is precisely this situation that the Court addressed itself in *Chambers* when it stated:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably,

> only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney,* supra, 399 U.S. at 51-52.

Clearly, these contentions are meritless.

The Constitution is a living instrument. In construing it for application to the ever-changing world in which we live, it is necessary that it be interpreted in a rational, commonsense manner, for it governs the lives of *all* our people. The respondent here has in reality, attempted to carve out an exception for "luggage" from the automobile exception and in so doing, has asked this Court to forge an interpretation of the Fourth Amendment which flies in the face of existing law, as well as common-sense and rational thought. Clearly, his contentions are meritless and must therefore be rejected.

CONCLUSION

For the foregoing reasons, the petitioner prays that relief be granted and the decision of the Arkansas Supreme Court be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 77-1497

STATE OF ARKANSAS,

Petitioner,

vs.

LONNIE JAMES SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARKANSAS.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

This brief is filed under Rule 42 of the Rules of this Court. We have received written consent from counsel from the State of Arkansas to file, and a letter to this effect has been lodged with the Clerk of the Court. Counsel for Respondent Sanders has consented verbally by telephone to our filing and his written consent is being mailed to us. We will send his letter to the Clerk of the Court immediately upon receipt.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law;
2. To inform the public of those needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law-abiding citizens; and
3. To assist the police, the prosecution, and the court in promoting a more effective and fairer administration of the criminal laws.

The interest of the *amicus curiae* in this case stems from the importance of constitutional questions of search and seizure in the not-uncommon situation whereby officers encounter moveable hand luggage in automobiles when they have legitimately detained the occupants of such automobiles upon probable cause. The resolution of this case will have a direct and material impact upon the effectiveness of law enforcement.

ARGUMENT.

In *United States* v. *Chadwick*, 433 U. S. 1 (1977), this Court invalidated the warrantless search of a 200-pound, double-locked footlocker which had been removed from the trunk of an automobile and taken to the office of federal narcotics agents, after the arrest of the suspects involved.

This case is similar only in that it involves a warrantless search of luggage in an automobile; and we suggest that the factual differences between the two cases, together with important policy considerations, mandate that the search in this case be upheld.

I.

THE DIFFERENCES IN THE FACTUAL SITUATIONS BETWEEN CHADWICK AND THE INSTANT CASE ARE SUCH THAT THE SEARCH IN THE INSTANT CASE SHOULD BE SUSTAINED.

As we read the majority opinion in *Chadwick, supra,* the main reasons the warrantless search of the footlocker was held to be unconstitutional are as follows:

1. The footlocker was relatively immobile in a physical sense, weighing, as it did, some 200 pounds.[1]
2. The footlocker was *legally* immobile. It had been removed from the trunk of Chadwick's car and had

1. The weight of the footlocker is mentioned twice in the majority opinion, 433 U.S., at 4 and 5. Additionally, Mr. Justice Brennan, in his concurring opinion, referred specifically to the fact that the footlocker was "heavy." 433 U.S., at 17, n. 2. Mr. Justice Blackmun, also note this point in his dissenting opinion in *Chadwick:*

> Perhaps the holding in the present case will be limited in the future to objects that are relatively immobile by virtue of their size or absence of means of propulsion. 433 U.S., at 21.

been transported to the DALE offices in the John F. Kennedy federal building in Boston.[2]

3. The automobile from whose trunk the footlocker was seized had been impounded and driven to the federal office building by federal agents.[3]

4. All three suspects had been placed under arrest *prior to* the seizure of the footlocker from the trunk of Chadwick's car, and they had all been handcuffed and taken to the federal building.[4]

5. The search of the footlocker was remote in time from its seizure. It took place about an hour and a half later at the federal building.[5]

6. The footlocker was double-locked.

The factual situation in the instant case differs markedly from that in *Chadwick*:

1. The piece of luggage in this case was a suitcase, which is a far more moveable item than a 200-pound footlocker.[6]

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2. On this point, the majority states:

> Once the federal agents had seized it at the railroad station and had safely transferred it to Boston federal building under their exclusive control, *there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. Id.* at 13. (emphasis supplied).

3. Id. at 4.

4. Id.

5. Id.

6. The United States Court of Appeals for the First Circuit also held unreasonable the search of suitcases (as opposed to footlockers) in *United States* v. *Chadwick*, 532 F.2d 773 (1st Cir. 1976); however, the question of the constitutionality of the search of hand luggage was not reached by this Court in its decision in *Chadwick:*

> [T]he petition for certiorari draws into question only the footlocker search; consequently, we need not pass on the legality of Chadwick's arrest or the search of the suitcases. 433 U.S., at 5, n. 2.

2. The suitcase involved herein was unlocked and was still in the trunk of the taxicab when it was seized and searched. The stop of the taxicab was made on the street, in a metropolitan area at about 5:00 p.m. The suspects had not been arrested at the time of the search of the suitcase, but were detained by the police beside the taxicab.

3. The taxicab in which respondent Sanders and his colleague Rambo were riding had not been seized and driven away by the officers involved (as was the case with Chadwick's automobile), nor was it likely that the taxicab *could* legally have been seized by the police, since the relationship between the taxicab and the contraband was merely "coincidental."[7] There was no suspicion that the taxicab driver himself was involved.

4. As noted, neither of the suspects had been placed under arrest when the search of the suitcase was made. Although the lower court conceded that the Little Rock police had probable cause to arrest respondent Sanders and Rambo,[8] the fact remains that the arrest had not taken place when the search was made. All of those involved were standing on the roadside by the stopped taxicab. This is a very material difference from the situation in *Chadwick* where all parties, their automobile *and* the footlocker were securely in custody at the federal building.

5. The search of the suitcase was contemporaneous with the stop of the taxicab, albeit prior to the actual arrest of respondent Sanders; again, a marked difference from the situation in *Chadwick*.

Although the instant case and *Chadwick* are superficially similar in that they both involved warrantless searches (in which

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7. *Sanders* v. *State*, 559 S.W.2d 704, 706 (Ark. 1977).

8. Id.

probable cause was not contested) of "luggage" contained in a moveable vehicle, we submit that the similarities between the two cases are far outweighed by the differences: the character of the item searched (unlocked hand luggage as opposed to a double-locked 200-pound footlocker); the fact that no arrest had been made prior to the search in this case; and the remoteness in time and place from the seizure and search in *Chadwick* as compared to the contemporaneous nature of the seizure and search in this case.

We believe that the facts and circumstances in the instant case bring it far more within the "automobile exception" to the search warrant rule than was the case in *United States* v. *Chadwick, supra. Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Cady* v. *Dombrowski,* 413 U.S. 433 (1973); *Cardwell* v. *Lewis,* 417 U.S. 583 (1974). We will not argue this point at length, however, for we do not intend to reiterate the legal arguments made by the State of Arkansas (although we agree with them and wish to associate ourselves with them). We will confine our arguments herein to a brief discussion, developed in the next section of this argument, of the fact that when police officers make "on the street" stops based on probable cause, of vehicles, they should be permitted to search such vehicles and any hand luggage contained therein, in order to determine if a crime has actually been committed.

II.

IN THE CIRCUMSTANCES OF THIS CASE, AN EXIGENCY EXISTED TO SEARCH THE HAND LUGGAGE BEING TRANSPORTED BY RESPONDENT.

This Court has long recognized that "exigent circumstances" will, in certain cases, justify a search without a warrant. *McDonald* v. *United States,* 335 U.S. 451 (1948); *Ker* v. *California,* 374 U.S. 23 (1963). Indeed, Mr. Chief Justice Berger, writing for the majority in *Chadwick* recognized this fact:

> In our view, *when no exigency is shown to support the need for an immediate search,* the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. 433 U.S., at 15. (emphasis supplied).

In most instances, "exigent circumstances" are thought of in terms of the police function, i.e. destruction of evidence, *Ker* v. *California, supra;* the possibility of dangerous instrumentalities,[9] and so on. We submit, however, that the situation exemplified by the instant case may create a new sort of "exigency" which is tied not only to the law enforcement function but also to the consideration of the rights of those who happen to be stopped by the police on probable cause.

In this case, as in *Chadwick,* there was no question but that the police had probable cause to believe that narcotics activities were afoot.[10] They had legal grounds to stop the taxicab and to detain Sanders and Rambo. "Probable cause", however, is not *absolute proof* that the suitcase contained marijuana. From the point of view of the police officers, *and of suspects similarly situated,* there was a necessity, or exigency, to search the hand luggage *at the scene,* in order to determine whether an arrest should be made; and this is exactly what the police in this case did.

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9. On this point, the Court in *Chadwick* stated:

> Of course, there may be other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest; for example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house wtihout opening the baggage and disarming the weapon. 433 U.S., at 15, n. 9. (citation omitted).

10. In *Chadwick,* thanks to the "alerting" of the detector dog, "Duke", "probable cause" to believe that marijuana was contained in the footlocker rose almost to a certainty. In the instant case, probable cause was based on police observations which in turn were based on a reliable informant's tip, plus corroboration by the suspects being in the right place and at the right times as had been foretold by the informant. *Draper* v. *United States,* 358 U.S. 307 (1959). There was no *certainty,* however, that the green suitcase did, in fact, contain marijuana.

Consider, for example, the situation which would have confronted the police, and the suspects had the green suitcase *not* contained marjuana, either because Sanders was innocent of any connection with the narcotics traffic, or (perhaps more realistically) because whatever "deal" he was involved in had not gone through. Sanders and Rambo would have been detained during the period of time in which the police secured a search warrant; and, since the stop took place about 5:00 p.m, on a Friday afternoon—after usual business hours—the delay might not have been inconsiderable.

An immediate search, in cases such as this one, will establish the fact of guilt or innocence of the crime of narcotics transportation fairly conclusively. If contraband (or other evidence of crime) is present, an immediate arrest will result, as it did in this case. If it is not found, the "suspects" will be permitted to go on their way; the detention of the suspects will have been minimal, as compared with the far more lengthy detention involved if they are transported to the police station and have to wait while the officers procure a search warrant for the hand luggage involved.

Herein lies the "exigency" which we postulate. Law enforcement officers in cases such as this, who have *probable cause* to believe a crime is being committed, but who have no *certainity* that the suspects are actually in possession of contraband, have an absolute need to make a contemporaneous search in order to determine if the crime has, in fact, been committed.

Any other holding would create a *per se* rule to the effect that, when hand luggage is involved, there must be a waiting period while a search warrant is procured to establish the factual existence, or non-existence, of the criminal act. Such a *per se* rule will hamper effective law enforcement procedures; but, more importantly, it will require lengthy detentions of persons who *may* be innocent.

We believe that the time factor—the period of detention while a search warrant is procured—to be of critical importance

in cases such as this one. This time factor becomes even more important if a *per se* rule were to be established, because such a rule would affect every law enforcement jurisdiction in the United States, and there are certain rural jurisdictions in which the procedure to secure a search warrant can take many hours —perhaps even days.

Amicus in this case had the opportunity to address this question, in a related context, in the case of *United States* v. *Bozada,* 473 F.2d 389 (8th Cir. 1973) (en banc). *Bozada* involved the warrantless search of a large truck trailer, full of stolen shoes, made by police officers of the City of St. Louis, Missouri. The question involved was whether it was necessary for the police, who had reliable information that the truckload of stolen property was soon to be moved, to procure a search warrant before seizing and searching the trailer.[11] A three-judge panel of the U. S. Court of Appeals for the Eighth Circuit had originally held that the warrantless search of the truck was illegal.[12] However, on rehearing *en banc,* the court held, 6-2 that the search was legal.[13]

Bozada involved the search of a vehicle, not of luggage, and we do not claim that it is on all fours with the instant case. Nevertheless, the "time element" question is similar to the point which we raised in *Bozada:* in many instances, particularly in rural areas, it may be a matter of many hours—perhaps extending into days—before a search warrant can be secured.

We respectfully urge this Court to consider the following situations, with regard to the securing of search warrants, which are taken from a survey of sheriff's departments in seven

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11. At the time of the search, the trailer was unattached to a tractor; however, it was in all other ways ready to move and a tractor could have easily been attached.

12. *United States* v. *Bozada,* No. 71-1727 (8th Cir. 1972).

13. *United States* v. *Bozada,* 473 F.2d 389 (8th Cir. 1973) (en banc). In fact, one of the panel judges changed his position and voted to uphold the search after the *en banc* hearing.

states in the Eighth Circuit and which we cited to the *en banc* court in *Bozada:*[14]

- *Arkansas: Chicot County:* Sheriff Max Brown polices 642 square miles with the help of two regular deputies. The highway patrol has two troopers assigned to the county. There are four part-time justices of the peace and no circuit judges in Chicot County. Two U. S. highways pass through the county.
- *Iowa: Ringgold County:* Sheriff E. T. Strange patrols 538 square miles with the help of one deputy. The highway patrol has one trooper assigned to the county; there are three part-time judges in Ringgold County. However the sheriff advises that occasions arise in which they are out of town and it might be necessary to go to another county to procure a search warrant.
- *Minnesota: Lake of the Woods County:* Sheriff Emmett Chilgren polices 1,311 square miles without the help of a regular deputy. The highway patrol has a single trooper assigned to the county. The county justice of the peace position was recently vacated, although Lake of the Woods County shares a county judge with two other counties. The county seat is Baudette, but the county judge may be holding court in Hallock, in Kittson County, a round-trip of 264 miles from Baudette. Snow falls up to 74 inches per year in the area, and the annual low temperature for the region is –34° F; the ground has more than an inch of snow on the average of 140 days a year. Sheriff Chilgren stated to counsel that a search warrant could take as long as two days to obtain under adverse circumstances.

14. The information was confirmed or updated as of November 8, 1978 by personal conversation between counsel for *amicus curiae* and most of the county sheriffs involved, or other successors in office.

- *Missouri: Barry County:* Sheriff Edwin Dummit polices 789 square miles with the help of four deputies. The highway patrol has two troopers assigned to the county. There is only one magistrate and one circuit judge in Barry County.
- *Nebraska: Sioux County:* Sheriff Tom Broderick patrols 2,063 square miles with the help of one deputy. The highway patrol does not have a trooper regularly assigned to the county. There is only one county judge in Sioux County.
- *North Dakota: Sheridan County:* Sheriff Leonard Hanson polices 989 square miles and has no regular deputies. The highway patrol does not station a trooper there. A single justice of the peace is the only judicial officer in Sheridan County. The average annual snowfall is 52 inches, the annual low temperature is —45° F, and more than one inch of snow is on the ground over 120 days a year.
- *South Dakota: Buffalo County:* Sheriff Francis E. Healey patrols 482 square miles with the help of one county deputy. The highway patrol does not have any troopers regularly assigned to the county. There are two part-time justices of the peace in Buffalo County.

The same is almost assuredly true of other rural areas in every state in this country. The waiting period while law enforcement officers obtain search warrants can involve quite an extended time period.

We submit that any kind of *per se* rule which requires a search warrant before any hand-luggage can be searched could cause major delays in time, which delays would, in turn, frustrate the law enforcement process and which might well cause the lengthy detention (albeit lawfully) of persons arrested on probable cause.

We wish to make it clear that we are in no way advocating a relaxation of the "probable cause" standard itself. This is fixed by law and court decision, and properly so. The instant case (and even *Chadwick*) presupposed that the police had a probable cause, in the legal sense, to make their search. All that we are advocating is the point that, *once probable cause is established*, law enforcement officers should be granted the power to search moveable hand luggage contained in an automobile or other vehicle, *at the time and place* of the arrest or stop.

A 200-pound double-locked footlocker which is in the unquestioned control of federal agents, at the federal building after the suspects (and their automobile) are in secure custody is a far cry from the situation in which a readily moveable unlocked suitcase is in the trunk of a taxicab which has been stopped on a pubilc highway, and a search is made prior to placing the suspects under arrest. In the latter class of cases, the police should have the authority to make an on-the-scene search. Such authority (again assuming that probable cause exists) will allow the police to make a decision as to whether a crime has actually been committed, and will eliminate hours of waiting, for the police; and for the suspects, if they should happen to be innocent.

Mr. Justice Blackmun, dissenting in *Chadwick, supra,* regretted that the Court did not take the opportunity in that case to "develop a clear doctrine concerning the proper consequences of custodial arrest." 433 U.S., at 17-18. The instant case presents such an opportunity; and we submit that, for the reasons set forth above, searches of moveable hand luggage contained in an automobile, which are made contemporaneously with a stop or arrest and which are based upon probable cause, should be held constitutionally permissible under the Fourth Amendment to the Constitution of the United States. We submit that such circumstances, in and of themselves, create one sort of exigency which this Court found to be lacking in *Chadwick*.

CONCLUSION.

To require that a search warrant be procured before moveable hand luggage, seized with probable cause in a vehicle, can be searched is an unrealistic interpretation of the Fourth Amendment. The realities of police work dictate that, in many cases, the requirement of a search warrant would be impracticable. We urge this Court to reverse the judgment of the Supreme Court of the State of Arkansas.

Respectfully submitted,

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